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Supreme Court, U.S.
FILED

No. 09-142 JUL 30 2009

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In The

# Supreme Court of the United States

GEOFFREY N. FIEGER,

*Petitioner,*

v.

MICHIGAN SUPREME COURT;
CLIFFORD W. TAYLOR; MAURA D. CORRIGAN;
ROBERT P. YOUNG, JR.; STEPHEN J. MARKMAN,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does an attorney have a First Amendment right to publicly express non-defamatory personal criticism of a judge when that criticism could not affect any pending trial, as the Ninth Circuit and the supreme courts of Colorado, Oklahoma, and Tennessee have held, or is attorney subject to discipline for such criticism, as the Seventh Circuit and the supreme courts of Michigan, Mississippi, and Missouri have held?

## LIST OF PARTIES

The parties are listed in the caption.

## CORPORATE DISCLOSURE STATEMENT

None of the parties is a privately or publicly held company to which Rule 29.6 applies.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Geoffrey N. Fieger respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the Sixth Circuit Court of Appeals.

## OPINIONS BELOW

The January 20, 2009, panel decision of the Sixth Circuit was recommended for full-text publication and is printed at App. 1. The petition for rehearing *en banc* was denied without opinion in an unpublished order dated May 1, 2009. App. 109.

The September 4, 2007, Opinion of the United States District Court for the Eastern District of Michigan granting Petitioner's Motion for Summary and Declaratory Judgment is unreported, but printed herein at App. 58.

## JURISDICTION

This Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(1).

The Sixth Circuit issued its opinion on January 20, 2009, and its order denying rehearing *en banc* on May 1, 2009. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., Amend. XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

Title 42 U.S.C. § 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Title 28 U.S.C. §§ 2201 & 2202.

Michigan Rules of Professional Conduct 3.5(c):

> A lawyer shall not engage in undignified or discourteous conduct toward the tribunal.

Michigan Rules of Professional Conduct 6.5(a):

> A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

## STATEMENT

### A. Underlying Discipline And Michigan Supreme Court Opinion

Petitioner Geoffrey N. Fieger is a nationally-known Michigan attorney and outspoken critic of Michigan's judiciary. In 1999, Mr. Fieger hosted the political talk show, "Fieger Time." The radio show was aired in the Detroit area.

On August 20, 1999, a three-judge panel of the Michigan Court of Appeals overturned a multi-million dollar jury verdict that Petitioner had obtained for one of his clients in a medical malpractice lawsuit. *Badalamenti v. William Beaumont Hosp.*, 602 N.W.2d

854 (Mich. Ct. App. 1999). In the wake of the court's decision, Petitioner Fieger went to the airways on "Fieger Time" and told the appellate judges to "kiss my ass." Days later, Petitioner compared the appellate judges to Nazis during another airing of "Fieger Time."

Two years after Petitioner's remarks, he was charged with a formal complaint by the Michigan Grievance Administrator for violating Michigan Rules of Professional Conduct 3.5(c) ("A lawyer shall not engage in undignified or discourteous conduct toward the tribunal") and MRPC 6.5(a) ("A lawyer shall treat with courtesy and respect all persons involved in the legal process"). Collectively, these are known as Michigan's "courtesy rules." Petitioner stipulated to a Consent Order of Discipline in which he pled no contest to the violations while specifically preserving his right to appeal the constitutionality of those rules.

On appeal, the Michigan Attorney Discipline Board dismissed the complaint in its entirety and held that Petitioner could not be disciplined under either MRPC 3.5(c) and 6.5(a) because his comments were protected by the First Amendment. The Grievance Administrator sought leave to appeal to the Michigan Supreme Court from the Board's dismissal of the complaint. The Michigan Supreme Court granted leave and heard arguments in the matter.

On July 31, 2006, by a vote of four to three, the Michigan Supreme Court reversed the order of dismissal from the Discipline Board and ordered that Petitioner be reprimanded as set forth in the

stipulated Consent Order. *Grievance Administrator v. Fieger*, 719 N.W.2d 123 (Mich. 2006), *cert. den.*, 127 S. Ct. 1257 (2007).

In reaching its decision, the Michigan Supreme Court held that MRPC 3.5(c) and 6.5(a) prohibit public criticisms of judges until such time as all appeals and the time in which to file an appeal has expired. According to the Michigan Supreme Court, because the *Badalamenti* case was still pending on appeal, Petitioner's comments violated the courtesy rules in question.

The Michigan Supreme Court also held that Petitioner's comments were not "political speech" and therefore were not protected by the First Amendment because "[t]here was no political campaign underway" and because Petitioner's remarks "can hardly be considered an 'interchange of ideas for the bringing about of political and social changes.'" *Griev. Adm'r*, 719 N.W.2d at 256 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The Michigan Supreme Court further held that the State had a compelling interest in disciplining attorneys for their public, non-defamatory criticisms of judges. Specifically, the Court explained that:

> [I]n a system which hundreds of judges, each of whom is subject to popular election, the state also has an interest in limiting attorney comment that takes the form of personal attacks on judges, because a system in which intimidating attacks are permitted

> fosters the risk of eventually realizing the intended effects of such attacks: a potentially cowed judiciary.

*Griev. Adm'r*, 719 N.W.2d at 259. The court also found that the courtesy rules did not prohibit strong criticisms of judges, but rather precludes only those criticisms "that could only bring disrepute on the legal system." *Id.* at 261.

The remaining three justices of the Michigan Supreme Court dissented from the four-member majority opinion. Justice Cavanagh, joined by Justice Weaver, would have held that Petitioner Fieger's remarks were political speech protected by the First Amendment. Justice Kelly filed a separate dissenting opinion in which she agreed that Petitioner's comments were protected by the First Amendment.

### B. Federal Court Action And District Court Opinion Declaring That Michigan's Courtesy Rules Are Unconstitutionally Overbroad And Vague

Having been twice cited for violating Michigan's courtesy rules, Petitioner Fieger filed the instant action in federal court challenging as unconstitutional Michigan's courtesy rules. Petitioner sought declaratory relief under 28 U.S.C. §§ 2201 & 2202 and asked the district court to strike down the rules as unconstitutionally broad in violation of the First Amendment and void for vagueness under the Fourteenth Amendment's Due Process Clause. Petitioner

named as defendants the justices of the Michigan Supreme Court in their official capacity.

On September 4, 2007, the district court issued its opinion declaring as unconstitutional MRPC 3.5(c) and 6.5(a). App. 58. Specifically, the district court held that the courtesy rules are unconstitutional "on their face because they are both overly broad and vague. Thus, they violate the First Amendment right to free speech and the Fourteenth Amendment right to due process of law." App. 59. The district court further concluded that:

> As interpreted by the Michigan Supreme Court, the State of Michigan's effort to regulate unprotected speech through the courtesy provisions causes a substantial amount of protected speech to be regulated as well. In addition, the courtesy provisions are so imprecise that persons of ordinary intelligence must guess at their meaning. Although it has long been recognized that states have legitimate interests in restricting attorney speech both to protect the fair administration of justice and to preserve the judiciary's integrity as well as the public's perception of it, these interests do not extinguish a Michigan attorney's First and Fourteenth Amendment constitutional rights to free speech and due process. Limiting an attorney's extrajudicial criticism of a branch of government in the name of preserving the judiciary's integrity is likely to have an unintended, deleterious effect upon the public's perception, since attorneys are often

> best suited to assess the performance of judges.

App. 59.

The district court further emphasized that the Michigan Supreme Court's decision in *Griev. Adm'r* provided no limit to the reach and scope of the courtesy provisions such that the rules were facially unconstitutional. Specifically, the district court pointed out that:

> the Michigan Supreme Court determined that the application of the courtesy provisions transcends not only the courtroom, the judges' chambers, the pleadings filed with the court, the offices used for depositions, and areas that hold a specific nexus between the conduct and a judicial proceeding, but all the way to extrajudicial statements made on the proverbial street corner, at the meeting-hall, on the radio, in the newspaper and even a [sic] one's household as long as a case is still pending, the comments concern the tribunal, and the comments are designed to reach the public and the court.

App. 71.

In reaching the merits of the constitutional challenge to the rules, the district court also held that Petitioner had standing to pursue his claims under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202. Specifically, the district court found that Petitioner's "fear of prosecution is not merely imaginary or speculative, since at oral argument Defendants

admitted that this was not the first time that Plaintiff Fieger has been threatened under these rules." App. 91.

Relying on this Court's decisions in *Steffel v. Thompson*, 415 U.S. 452 (1974) and *MedImmune v. Genentech*, 549 U.S. 118 (2007), the district court emphasized that "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." App. 92 (quoting *Steffel*, 415 U.S. at 459). Defendants appealed the district court's opinion to the Sixth Circuit Court of Appeals.

### C. Sixth Circuit Opinion Dated January 20, 2009, Vacating The Declaratory Judgment Of The District Court For Lack Of Standing

On January 20, 2009, the Sixth Circuit issued a 2-1 opinion vacating the district court's grant of declaratory relief and held that Petitioner lacked standing to challenge as unconstitutional Michigan's courtesy rules.

Specifically, the majority opinion held that Petitioner

> lack[s] standing because [he] [has] failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; [he] [has] not articulated, with any degree of specificity, [his] intended speech and conduct; and [he]

> [has] not sufficiently established a threat of future sanctions under the narrow construction of the challenged provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief.

App. 3.

Disagreeing with the majority, the dissent argued vigorously that the district court was correct in concluding that Petitioner had standing to invoke the jurisdiction of the court, and also agreed with the district court that the courtesy rules were facially unconstitutional. App. 50 ("In sum, the Michigan Supreme Court says that lawyers are free to criticize judges, but may only do so in a manner that shows courtesy and respect. The vagueness – and potential reach – of this requirement hardly needs further elaboration.").

On the issue of standing, the dissent, like the district court, relied on this Court's decisions in *MedImmune* and *Steffel*. Quoting this Court, the dissent emphasized that:

> Where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of

> prosecution, but nonetheless does not eliminate Article III jurisdiction.

App. 53.

The dissent also faulted the majority for insisting that Petitioner provide the court with details about when and how he wished to next criticize the judiciary in the context of a facial challenge to the courtesy rules. As the dissent points out:

> It is also worth noting that the majority's apparent demand for detailed allegations about the sorts of decision that Fieger will criticize and the specific language that he will use is particularly inappropriate in a suit for a declaration concerning the *facial* validity of the Rules. If plaintiffs had sought a declaration that certain specific actions could not be punished under the Rules – that is, "a pre-application, as-applied challenge," (internal citations omitted) – it would be appropriate to require that they allege the behavior with a high degree of specificity and demonstrate the likelihood that they will undertake that behavior in the future. But where they seek a declaration that the law, on its face, is unconstitutionally vague and overbroad, what is the point of having plaintiffs' standing turn on the specificity of their planned conduct? A facial challenge to the Rules will be resolved by reference to the text of the Rules and any limiting constructions Michigan courts have given them; the specific conduct that gave rise to the facial challenge is of little relevance and should not

be determinative of the existence of a case or controversy.

App. 55-56.

## REASONS FOR GRANTING THE PETITION

### I. At Least Two Circuits And Six State Supreme Courts Have Divided On Whether The First Amendment Protects Attorneys From Discipline For Public, Non-Defamatory Statements Criticizing Judges

This case presents an important constitutional question concerning the First Amendment rights of attorneys to speak critically about the judiciary. Do attorneys enjoy the same First Amendment rights as all other citizens possess to publicly criticize judges where such criticisms will not affect a pending trial. This question has created a deep split of authority among both state and federal courts.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991), this Court held that attorneys participating in a *pending trial* may constitutionally be disciplined for public remarks that produce a "substantial likelihood of material prejudice" to the administration of justice. Such a restriction, this Court held, is constitutional because it is narrowly tailored to assure the impartiality of the jurors.

In *Griev. Adm'r* the Michigan Supreme Court relied on *Gentile* to discipline Petitioner for his out-of-court criticisms of judges made during a radio show. According to the Michigan Supreme Court, Petitioner's case was still pending within the meaning of *Gentile* because further appeals were still available at the time Petitioner criticized three Michigan appellate judges.

This case directly presents the issue of whether the First Amendment protects attorneys from discipline for public, non-defamatory remarks that are critical of the judiciary when there is no pending trial and thus no risk of influencing potential jurors or witnesses.

The Ninth Circuit and the highest courts in Colorado, Oklahoma, and Tennessee have held, directly contrary to the Michigan Supreme Court's decision in *Griev. Adm'r v. Fieger*, that an attorney has a First Amendment right to express opinions critical of judges outside of the judicial process so long as such expressions could not influence a pending trial. *See Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437-40 (9th Cir. 1995) (finding that First Amendment protected attorney's published statements characterizing judge who had sanctioned him as anti-Semitic and dishonest); *In re Green*, 11 P.3d 1078, 1083-87 (Colo. 2000) (finding that First Amendment protected attorney's statements that judge who was considering pending motion was racist); *Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 964-70 (Okla. 1988) (First Amendment protected

attorney's statements to news media, made immediately after sentencing of client, characterizing judge as racist); *Ramsey v. Bd. of Professional Responsibility*, 771 S.W.2d 116, 120-22 (Tenn. 1989) (holding that First Amendment protected prosecutor's disrespectful statements to news media, including statement criticizing judge).

These courts and others have recognized three critical distinctions between protected attorney speech and attorney speech that is subject to discipline. First, attorneys may be disciplined for making false statements of fact about judges, but have a constitutional right to express critical opinions. *See Yagman*, 55 F.3d at 1437-38 (recognizing that ethical rules may constitutionally punish "false statements impugning the integrity of a judge"); *Porter*, 766 P.2d at 969 ("There is no First Amendment protection afforded remarks critical of the judiciary when those statements are false"). Second, attorneys have no constitutional right to express disrespectful opinions while in court or in court pleadings, but do enjoy the right to make such statements in public. *See Ramsey*, 771 S.W.2d at 122-24 (disciplining prosecutor who refused to answer judge's questions and slammed courtroom door during hearing); *see also Disciplinary Counsel v. Gardner*, 793 N.E.2d 425 (Ohio 2003) (upholding discipline against attorney who filed motion accusing judges of bias and corruption), *cert. den.*, 540 U.S. 1220 (2004). Third, an attorney may be disciplined for public statements that could affect the integrity of a pending trial, as this Court held in

*Gentile*, but not for statements made when there is no trial pending. *See Yagman*, 55 F.3d at 1442-44 (distinguishing *Gentile* on this ground).

By contrast, the Seventh Circuit and the supreme courts of Mississippi, Missouri, and Michigan have held that the First Amendment does not protect attorneys from discipline imposed for extrajudicial statements of opinion critical of judges even when such statements cannot affect a pending trial. *See Matter of Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) (rejecting *Yagman* as "inconsistent with *Gentile*" and holding that attorney may be disciplined for stating "I think that Judge X is dishonest"), *cert. den.*, 517 U.S. 1223 (1996); *Mississippi Bar v. Lumumba*, 912 So.2d 871, 833-84 (Miss.) (holding that First Amendment did not protect attorney's published statement that judge had "judicial temperament of a barbarian"), *cert. den.*, 126 S. Ct. 363 (2005); *Matter of Westfall*, 808 S.W.2d 829, 833-38 (Mo.) (finding that First Amendment did not protect prosecutor's televised statement criticizing appellate judge's ruling as "a little bit less than honest"), *cert. den.*, 502 U.S. 1009 (1991).

In these cases, the courts concluded that attorneys could be disciplined for statements that non-attorneys could make with full First Amendment protection because of the state's interest in protecting the reputation of the judiciary. *See Palmisano*, 70 F.3d at 487 (reasoning that attorneys may be required "to speak with greater care and civility than is the norm in political campaigns" because "[i]ndiscriminate

accusations of dishonesty . . . do not help cleanse the judicial system of miscreants yet do impair its functioning"); *Lumumba*, 912 So.2d at 883 (concluding attorney's remarks to newspaper not protected because of state interest "in protecting and defending its public officials and in maintaining a respect for the judiciary").

This split of authority justifies the exercise of this Court's jurisdiction to hear this matter. The position taken by the Ninth Circuit and the supreme courts of Colorado, Oklahoma, and Tennessee is contrary to the position taken by the Seventh Circuit and the supreme courts of Michigan, Missouri, and Mississippi. Based on this split of authority, the First Amendment fully protects the right of attorneys in some jurisdictions to express opinions critical of judges outside of the judicial context, while attorneys in other jurisdictions would be disciplined for expressing those same opinions.

## II. The Sixth Circuit's Published Decision Conflicts With The Supreme Court's Jurisprudence Regarding Standing In The Context Of A Declaratory Judgment Act

Certiorari is also appropriate because the Sixth Circuit's decision represents a fundamental misunderstanding of this Court's jurisprudence on standing in the context of a declaratory judgment action.

Relying on this Court's decision in *MedImmune*, the Sixth Circuit dissent points out:

> The Court in *MedImmune* drew on *Steffel v. Thompson*, 415 U.S. 452 (1974), a case in which the plaintiff did not have to "proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution," explaining:
>
> As then-Justice Rehnquist put it in his concurrence, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." [*Steffel*, 415 U.S.] at 480. In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. *See Terrace* [*v. Thompson*, 263 U.S. 197, 215-16 (1923)]; *Steffel*, [415 U.S.] at 459. The dilemma posed by that coercion – putting the challenger to the choice between abandoning his rights or risking prosecution – is "a dilemma that it was the very purpose of the Declaratory Judge Act to ameliorate." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967). *MedImmune*, 549 U.S. at 129.

App. 54 n.5.

Contrary to this Court's decisions in both *Steffel* and *MedImmune*, the majority decision of the Sixth Circuit held that Petitioner lacked standing to challenge Michigan's courtesy rules because he "failed to demonstrate actual present harm or a significant

possibility of future harm based on a single, stipulated reprimand." App. 45-46.

As the Sixth Circuit dissent notes:

> Standing to bring suit under the Declaratory Judgment Act is subject to different requirements than standing to sue for damages for an injunction. The majority blurs these requirements by demanding that plaintiffs demonstrate a pattern of disciplinary actions so consistent that we can infer inevitable and imminent future harm.

App. 52-53. As revealed by the dissent, the majority's opinion regarding Article III standing conflicts with this Court's decisions in both *Steffel* and *MedImmune*.

Apart from the conflict between the Sixth Circuit and this Court's jurisprudence on standing, this case presents a deep split of authority as to the First Amendment rights of attorneys to express public, non-defamatory criticisms of judges. Both of these reasons justify the exercise of this Court's jurisdiction.

For this reason, Petitioner prays that this Honorable and Supreme Court grant the instant petition for writ of certiorari, or summarily reverse the decision of the Sixth Circuit finding that Petitioner lacked standing to challenge the courtesy rules and remand this matter to the circuit court for consideration on the merits of Petitioner's constitutional claims.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for writ of certiorari. Alternatively, the Court should summarily reverse the decision of the Sixth Circuit finding that Petitioner lacked standing and remand the matter for further consideration.

Respectfully submitted,

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Dated: July 30, 2009

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206

File Name: 09a0020p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

---

GEOFFREY NELS FIEGER and RICHARD L. STEINBERG,

*Plaintiffs-Appellees,*

*v.*

MICHIGAN SUPREME COURT; CLIFFORD W. TAYLOR; MAURA D. CORRIGAN; ROBERT P. YOUNG, JR.; and STEPHEN J. MARKMAN,

*Defendants-Appellants,*

MICHAEL F. CAVANAUGH; ELIZABETH A. WEAVER; and MARILYN KELLY,

*Defendants.*

No. 07-2213

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-111684 – Arthur J. Tarnow, District Judge.

Argued: October 23, 2008

Decided and Filed: January 20, 2009

Before: BOGGS, Chief Judge; MERRITT and GRIFFIN, Circuit Judges.

## COUNSEL

**ARGUED:** Margaret A. Nelson, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants. Michael R. Dezsi, FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX, Southfield, Michigan, for Appellees. **ON BRIEF:** Margaret A Nelson, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellants. Michael R. Dezsi, FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX, Southfield, Michigan, Richard L. Steinberg, Detroit, Michigan, for Appellees.

GRIFFIN, J., delivered the opinion of the court, in which BOGGS, C. J., joined. MERRITT, J. (pp. 28-34), delivered a separate dissenting opinion.

## OPINION

GRIFFIN, Circuit Judge. After a panel of judges on the Michigan Court of Appeals reversed a $15 million judgment initially entered in favor of his client, and while the case was pending before the court, attorney Geoffrey Nels Fieger made vulgar comments about the judges on a radio show he hosted. The Michigan Attorney Grievance Administrator charged Fieger with violating Michigan Rules of Professional Conduct (MRPC) 3.5(c) and 6.5(a), the

"courtesy and civility" provisions. Pursuant to a settlement, Fieger stipulated to a disciplinary reprimand while reserving his rights to challenge the applicability and constitutionality of the rules. Thereafter, the Michigan Supreme Court upheld the violations and the constitutionality of the rules as applied to Fieger. *Grievance Adm'r v. Fieger,* 719 N.W.2d 123 (Mich. 2006).

In the present case, Fieger and co-plaintiff Richard Steinberg, Fieger's attorney, challenge the constitutionality of the disciplinary rules on facial grounds. The United States District Court for the Eastern District of Michigan held that the courtesy and civility provisions violate the First and Fourteenth Amendments to the United States Constitution because the rules are overly broad and vague and enjoined their enforcement.

We vacate the judgment of the district court and remand with instructions to dismiss the complaint for lack of jurisdiction. We hold that Fieger and Steinberg lack standing because they have failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; they have not articulated, with any degree of specificity, their intended speech and conduct; and they have not sufficiently established a threat of future sanction under the narrow construction of the challenged provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief.

I.

The facts are set forth by the Michigan Supreme Court in 719 N.W.2d at 129-31:

> In 1997, a jury in the Oakland Circuit Court returned a $15 million verdict in a medical malpractice action in which [attorney Geoffrey] Fieger represented the plaintiff Salvatore Badalamenti. On appeal, the defendants hospital and physician claimed that the verdict was based on insufficient evidence and that they had been denied their constitutional right to a fair trial by Mr. Fieger's intentional misconduct. After hearing argument, a three-judge panel of the Court of Appeals, Jane Markey, Richard Bandstra, and Michael Talbot, unanimously ruled on August 20, 1999, that the defendants were entitled to judgment notwithstanding the verdict because the plaintiff had failed to provide legally sufficient evidence that would justify submitting the case to the jury. [*Badalamenti v. William Beaumont Hosp.-Troy,* 602 N.W.2d 854 (1999).] The panel also held that Mr. Fieger's repeated misconduct by itself would have warranted a new trial. In particular, the Court of Appeals indicated that Mr. Fieger (1) without any basis in fact, accused defendants and their witnesses of engaging in a conspiracy, collusion, and perjury to cover up malpractice, (2) asserted without any basis in fact that defense witnesses had destroyed, altered, or suppressed evidence, and (3) insinuated without any basis in fact that one of the defendants

had abandoned the plaintiff's medical care to engage in a sexual tryst with a nurse. The panel described Mr. Fieger's misconduct as "truly egregious" and "pervasive" and concluded that it "completely tainted the proceedings." *Id.* at [860].

Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the *Badalamenti* trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Mr. Fieger, referring to his client, then said, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses."

Two days later, on the same radio show, Mr. Fieger called these same judges "three jackass Court of Appeals judges." When another person involved in the broadcast used the word "innuendo," Mr. Fieger stated, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think – what was Hitler's – Eva Braun,

I think it was, is now Judge Markey, she's on the Court of Appeals."

Subsequently, Mr. Fieger filed a motion for reconsideration before the same panel. After that motion was denied, this Court denied Mr. Fieger's application for leave to appeal on March 21, 200[1]. [*Badalamenti v. William Beaumont Hosp.-Troy,* 463 Mich. 980, 624 N.W.2d 186 (2001).]

On April 16, 2001, the Attorney Grievance Commission (AGC), through its Grievance Administrator, filed a formal complaint with the ADB [Attorney Discipline Board], alleging that Mr. Fieger's comments on August 23 and 25, 1999, were in violation of several provisions of the Michigan Rules of Professional Conduct, including MRPC 3.5(c), MRPC 6.5(a), and MRPC 8.4(a) and (c). While the complaint was pending, the parties entered into a stipulation. In return for Mr. Fieger's agreement not to contest that his remarks had violated MRPC 3.5(c) and MRPC 6.5(a), the charges alleging a violation of MRPC 8.4(a) and (c) would be dismissed. The parties further stipulated the sanction of a reprimand. The agreement was specifically conditioned on Mr. Fieger's being allowed to argue on appeal, while the discipline was stayed, both the applicability and the constitutionality of MRPC 3.5(c) and

MRPC 6.5(a).[1] Mr. Fieger maintained that the rules were inapplicable because his remarks were made after the case was completed and were not made in a courtroom. Further, he maintained that the two rules were unconstitutional because they infringed his First Amendment rights.

On appeal to the ADB, with one member recused, the remaining eight members of the ADB issued three opinions. The lead opinion, signed by board members Theodore J. St. Antoine, William P. Hampton, and George H. Lennon, concluded that MRPC 3.5(c) and MRPC 6.5(a) did not apply to Mr. Fieger's comments because they were made outside the courtroom in a case they regarded as completed. They further observed that, if the rules did apply, then they were in violation of the First Amendment. A second opinion, signed by members Lori McAllister and Billy Ben Baumann, agreed that Mr. Fieger's comments were protected by the First Amendment, but dissented from the lead opinion's conclusion that the rules only apply to remarks made within the courtroom. A third opinion, agreeing in part with the second opinion, and signed by members Marie E. Martell, Ronald L. Steffens, and Ira

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[1] MRPC 3.5(c) provides that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal." MRPC 6.5(a) provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." Both rules, collectively, are known as the "courtesy and civility" provisions.

Combs, Jr., held that Mr. Fieger's remarks, even though made outside the courtroom, were prohibited by the rules, and that the remarks were not protected by the First Amendment.

The sum of all this was that a majority (albeit not the same majority for each issue) concluded that the two rules applied to Mr. Fieger's out-of-court statements, while a different majority concluded that those rules were in violation of the First Amendment.

The AGC, through its Grievance Administrator, sought leave to appeal in this Court. We granted leave to appeal to consider whether the remarks by Mr. Fieger, although uncontestedly discourteous, undignified, and disrespectful, nevertheless did not warrant professional discipline because they were made outside the courtroom and after the Court of Appeals had issued its opinion. We also granted leave to appeal to consider whether the ADB possesses the authority to decide issues of constitutionality and whether the two rules in question are constitutional.[7]

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[7] 696 N.W.2d 703 (2005). Mr. Fieger then filed a notice of removal on June 8, 2005, removing the case to federal court. Because Mr. Fieger could not "meet his burden to show removal is proper," the federal district judge granted the Grievance Administrator's motion to remand the case back to this Court

on October 19, 2005. *Griev. Adm'r,* 409 F. Supp. 2d 858, 865 (E.D. Mich. 2005). Mr. Fieger appealed to the Sixth Circuit Court of Appeals. On March 10, 2006, the Sixth Circuit summarily affirmed the district court, concluding that "there is no conceivable basis to support removal of the action" under 28 U.S.C. § 1443(1). Unpublished order, entered March 10, 2006 (Docket No. 05-2572).

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The Michigan Supreme Court reversed the decision of the ADB. *Id.* at 145. The court first clarified that MRPC 3.5(c) and MRPC 6.5(a) were not designed to "silence," "censor," or "prohibit criticism"; rather, the provisions were intended to prohibit only "undignified," "discourteous," and "disrespectful" conduct or remarks. *Id.* at 135. The court then concluded that Fieger violated MRPC 3.5(c) and MRPC 6.5(a) because his speech and conduct concerned a "pending" case and were directed "toward the tribunal." *Id.* at 136-38. Finally, the court rejected Fieger's characterization of the speech as political speech or public-figure comment and held that MRPC 3.5(c) and MRPC 6.5(a) were not unconstitutionally vague. *Id.* at 139-44. The United States Supreme Court denied Fieger's petition for writ of certiorari. 127 S. Ct. 1257 (2007).

Before the Michigan Supreme Court released its opinion, Fieger and co-plaintiff Richard Steinberg, Fieger's attorney, filed suit under the Declaratory

Judgment Act, 28 U.S.C. § 2201(a),[2] in the United States District Court for the Eastern District of Michigan. In their federal suit, plaintiffs neither challenged the Michigan Supreme Court's determination that the courtesy and civility rules were constitutional as applied to Fieger's conduct and speech, nor sought to vacate the reprimand imposed on Fieger; rather, plaintiffs raised facial challenges to the courtesy and civility provisions. Specifically, plaintiffs asserted that the rules violate the First and Fourteenth Amendments to the United States Constitution because, allegedly, they (1) unconstitutionally abridge freedom of speech and expression, (2) do not further a compelling government interest, (3) are not the least restrictive means to further a government interest, and (4) are unconstitutionally vague and overly broad. Plaintiffs requested declaratory relief and entry of an injunction preventing enforcement of MRPC 3.5(c) and MRPC 6.5(a).

The district judge granted plaintiffs' request for declaratory relief, concluding that MRPC 3.5(c) and MRPC 6.5(a), as construed by the Michigan Supreme

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[2] 28 U.S.C. § 2201(a) permits, "[i]n a case of actual controversy within its jurisdiction," . . . "any court of the United States, upon the filing of an appropriate pleading," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The statute further provides that "[a]ny such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Court in *Fieger,* are unconstitutionally vague and overly broad and enjoined their enforcement. The Michigan Supreme Court and four of its justices timely appeal.[3]

II.

As a preliminary matter, we note that a claimant who makes a facial attack on a law is requesting "strong medicine." *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). "[F]ederal courts do not lightly uphold facial challenges" because such efforts do not seek to invalidate laws in concrete, factual settings but to "leave nothing standing." *Warshak v. United States,* 532 F.3d 521, 528 (6th Cir. 2008) (en banc). Further, "[c]laims of facial invalidity often rest on speculation[,] . . . raise the risk of premature interpretation[,] . . . run contrary to the fundamental principle of judicial restraint[,] . . . [and] threaten to short-circuit the democratic process." *Wash. State Grange v. Wash. State Republican Party,* 128 S. Ct. 1184, 1191 (2008) (citations omitted). For these reasons, facial invalidation of a statute is a remedy that courts employ "sparingly and only as a last resort." *Broadrick,* 413 U.S. at 613.

Moreover, to succeed on their overbreadth challenge, plaintiffs bear a heavy burden. They must

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[3] The district court entered a judgment dismissing the three justices who dissented from the Michigan Supreme Court decision.

demonstrate that "the statute's overreach is *substantial,* not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep. . . ." *Bd. of Trs. v. Fox,* 492 U.S. 469, 484-85 (1989) (internal quotations and citation omitted).

Against this background, we doubt that plaintiffs would be successful on the merits of their claim. However, we do not decide the merits because plaintiffs lack standing to assert their claim.

## III.

### A.

Article III of the United States Constitution "does not extend the 'judicial power' to any legal question, wherever and however presented, but only to those legal questions presented in 'Cases' and Controversies.'" *Warshak,* 532 F.3d at 525 (quoting U.S. CONST., art. III, § 2).[4] In recognition of the

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[4] Art. III, § 2, cl. 1 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State,

(Continued on following page)

Constitution's limit on judicial authority, the Declaratory Judgment Act, 28 U.S.C. § 2201(a), permits a court to enter declaratory relief only "[i]n a case of actual controversy. . . ." Article III's "case and controversy" requirement is not satisfied, and a court therefore has no jurisdiction, when the claimant lacks standing, that is, "a sufficiently concrete and redressable interest in the dispute." *Warshak,* 532 F.3d at 525. Thus, "[s]tanding is the 'threshold question in every federal case.'" *Grendell v. Ohio Supreme Court,* 252 F.3d 828, 832 (6th Cir. 2001) (quoting *Coyne v. Am. Tobacco Co.,* 183 F.3d 488, 494 (6th Cir. 1999)).

Whether a party has standing is a question of law that we review de novo. *United Steelworkers of Am. v. Cooper Tire & Rubber Co.,* 474 F.3d 271, 277 (6th Cir. 2007). While litigation based on hypotheticals is disfavored, it is allowed under certain circumstances in the First Amendment context. *Broadrick,* 413 U.S. at 612 (1973). "Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.*

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or the Citizens thereof, and foreign States, Citizens or Subjects.

not eviscerate the standing requirement, which is a *constitutional* mandate that is "absolute" and "irrevocable." *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 349-50 (6th Cir. 2007) (citing *Warth v. Seldin,* 422 U.S. 490, 500 (1975)). Indeed, "[t]he Supreme Court has made clear that the injury in fact requirement still applies to overbreadth claims under the First Amendment." *Prime Media,* 485 F.3d at 350 (citing *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 392-93 (1988)) (holding that "[t]o bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some threatened or actual injury resulting from the putatively illegal action."); *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 958 (1984) ("The crucial issues [for overbreadth standing] are whether [the plaintiff] satisfies the requirement of injury-in-fact, and whether [the plaintiff] can be expected satisfactorily to frame the issues in the case.").

"The burden of establishing standing is on the party seeking federal court action." *Rosen v. Tenn. Comm'r of Fin. & Admin.,* 288 F.3d 918, 927 (6th Cir. 2002) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992)). To satisfy the Constitution's standing requirement, a party must establish that:

> (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant;

> and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing. The plaintiff must allege and/or demonstrate actual present harm or a significant possibility of future harm.

*Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) (internal citations and quotation marks omitted).

Fieger presents two arguments in support of his contention that he has standing to make facial challenges to MRPC 3.5(c) and MRPC 6.5(a). First, he asserts that he suffers actual present harm because the courtesy and civility rules and the threat of discipline for violating them have "chilled" his speech and conduct. Second, he contends that he suffers a significant possibility of future harm because he has twice been subjected to disciplinary proceedings under the rules. Steinberg contends that he has standing to contest the constitutionality of the courtesy and civility rules because "[s]ince the Michigan Supreme Court released its opinion . . . , Steinberg has, for the most part, ceased publishing comment publicly critical of the Court." None of these arguments, however, is sufficient to confer standing on either plaintiff in this case.

B.

In *Morrison v. Board of Education*, 521 F.3d 602 (6th Cir. 2008), we observed that "the Supreme Court

is emphatic: 'Allegations of a subjective "chill" are not an adequate substitute for a claim of *specific present objective* harm or a threat of *specific future* harm.'" *Id.* at 608 (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)) (emphasis added). We also noted that "absent proof of a concrete harm, where a First Amendment plaintiff only alleges inhibition of speech, the federal courts routinely hold that no standing exists." *Id.* at 609 (citations omitted). In *Morrison,* we articulated why an allegation of "chill," by itself, is insufficient to establish standing in a First Amendment case:

> In *Adult Video Ass'n v. United States Department of Justice,* 71 F.3d 563 (6th Cir. 1995), we explained that First Amendment chill typically constitutes the "*reason* why the governmental imposition is invalid rather than . . . the harm which entitles [a party] to challenge it." *Id.* at 566 (quoting *United Presbyterian Church* [*in the U.S.A. v. Reagan*], 738 F.2d [1375, [] 1378 [(1984)]). This understanding of chill comports with the underlying rationales of intersecting First Amendment doctrines. For example, the doctrine of overbreadth relies on a "chill" theory to permit a litigant – who *already has standing* by virtue of demonstrating a concrete harm – to challenge a rule that may only affect others. *See Midwest Media Prop., L.L.C. v. Symmes Twp.,* 503 F.3d 456, 463 (6th Cir. 2007) ("[O]verbreadth does not excuse a party's failure to 'allege an injury arising from the specific rule being challenged. . . .'" (quoting *Prime Media, Inc.*

> *v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007))); *United Presbyterian Church*, 738 F.2d at 1379 ("It is only in this . . . respect that 'chilling effect' has anything to do with the doctrine of standing: It permits a person, who has standing to challenge governmental action because of the concrete harm it causes him, to assert a deficiency which may not affect him but only others."). In order to have standing, therefore, a litigant alleging chill must still establish that a concrete harm – i.e., enforcement of a challenged statute – occurred or is imminent. *See Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992) ("[W]hether plaintiffs have standing . . . depends on how likely it is that the government will attempt to use these provisions against them . . . and not on how much the prospect of enforcement worries them.").

*Id.* at 609-10.

Morrison was a high school student and a Christian who believed that his faith required him to tell students who were homosexual that their sexual conduct was a sin. *Id.* at 605. The high school had a written policy, however, that prohibited students from derogating other students on the basis of their sexual orientations. *Id.* "Wary of potential punishment, Morrison remained silent with respect to his personal beliefs, but challenged in federal court the Board's right to stifle his speech." *Id.* After filing his lawsuit, the school board revised its policy and codes of conduct to permit anti-homosexual speech unless it

was "sufficiently severe or pervasive that it adversely effects a student's education or creates a climate of hostility or intimidation for that student, both from the perspective of an objective educator and from the perspective of the student at whom the harassment is directed." *Id.* at 607. The sole issue on appeal was whether Morrison had standing to pursue his claim that the school board's policies had "chilled" his speech. *Id.* at 608. We held that he did not. We explained that:

> The claim at stake here involves Morrison's choice to chill his own speech based on his perception that he would be disciplined for speaking. But whether he would have been so punished, we can only speculate. The school district . . . stated that its former discipline policy regarding instances of harassment or discrimination "shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process." The record is silent as to whether the school district threatened to punish or would have punished Morrison for protected speech in violation of its policy. Morrison asks us, essentially, to find a justiciable injury where his own subjective apprehension counseled him to choose caution and where he assumed – solely on the basis of the Board's 2004-05 policies and without any specific action by the Board – that were he to speak, punishment would

> result. We decline to do so. Absent a concrete act on the part of the Board, Morrison's allegations fall squarely within the ambit of "subjective chill" that the Supreme Court definitively rejected for standing purposes. *Laird,* 408 U.S. at 13 (quotation marks omitted). Morrison cannot point to anything beyond his own "subjective apprehension and a personal (self-imposed) unwillingness to communicate," *ACLU* [*v. Nat'l Sec. Agency*], 493 F.3d [644,] [ ] 662 [(6th Cir. 2007)], and those allegations of chill, without more, fail to substantiate an injury-in-fact for standing purposes.

*Id.*

Although the facts in this case differ from those in *Morrison* because the Michigan Supreme Court *has* sanctioned Fieger under MRPC 3.5(c) and MRPC 6.5(a), the outcome remains the same for two reasons. First, unlike Morrison, plaintiffs here make no attempt to articulate, with *any* amount of specificity, their intended speech or conduct. In *Morrison,* we determined that the alleged "chill" was insufficient to constitute an injury-in-fact, despite a specific, unambiguous proffer by Morrison of his intended speech. Morrison intended to convey to homosexual students that their sexual conduct was immoral. Notwithstanding that relatively particularized statement of intention, we concluded that the threat of punishment under the challenged policies was still impermissibly conjectural under a policy that had not been enforced. Here, the converse is present: while

the challenged rules have been enforced, plaintiffs fail to sufficiently articulate their intended speech or conduct. They make only vague suggestions of a *general* desire to criticize the Michigan judiciary. They have not presented sufficient facts to demonstrate a threat of sanction arising from their unspecified future criticisms.

Second, the threat of future injury arising from a general desire to criticize the Michigan judiciary is significantly diminished by the narrow construction placed on the courtesy and civility provisions by the Michigan Supreme Court and by the specific factual context in which Fieger was sanctioned. Like the school board in *Morrison* which determined that its policy would not apply "to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process[,]" the Michigan Supreme Court emphasized that Fieger violated the rules, not because he criticized judges, but because he made *vulgar, personally abusive* comments about participants in a *pending* case. Specifically, the court noted that:

> greater restraint . . . is permissible when a case is ongoing than when it is completed. As the United States Supreme Court said in *Gentile* [*v. State Bar of Nevada,* 501 U.S. 1030, 1070 (1991),] "'When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of

> justice by premature statement, argument or intimidation hardly can be denied.'" (Citation omitted.) Accordingly, "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press. . . ." *Id.* at 1074.

*Fieger,* 719 N.W.2d at 135. In assessing Fieger's speech, the court explained that:

> [t]o call a judge a "jackass," a "Hitler," a "Goebbels," a "Braun" and to suggest that a lawyer is "declar[ing] war" on them and that the judge should "[k]iss [the lawyer's] ass," or should be anally molested by finger, fist, or plunger, is, to say the least, not to communicate information; rather, it is nothing more than *personal abuse.* We conclude that such coarseness *in the context of an officer of the court participating in a legal proceeding* warrants no First Amendment protection when balanced against this state's compelling interest in maintaining public respect for the integrity of the legal process. *United States v. O'Brien,* 391 U.S. 367, 377 (1968).

*Id.* at 142 (emphasis added). The defendant justices prudently clarified that MRPC 3.5(c) and MRPC 6.5(a) do not preclude lawyers generally from expressing "disagreement" or "criticism, even strong criticism," of judges. *Id.* at 143. Indeed, the court specifically noted that "lawyers have an unquestioned right to criticize the acts of courts and judges." *Id.* at

144 (citing *In re Estes,* 94 N.W.2d 916 (1959)). In Fieger's case, however, the court determined that his remarks about participants in a pending legal proceeding were so unambiguously "vulgar and crude" as to be undeserving of constitutional protection. *Fieger,* 719 N.W.2d at 144. Fieger's outrageous remarks were made during the time allowed to file a motion for reconsideration before the very panel to which the comments were directed, and such a motion was indeed filed in the immediate aftermath of the remarks.

In light of the narrowing construction placed on the rules by the Michigan Supreme Court in *Fieger,* the court's acknowledgment that lawyers have a right to criticize judges generally, and Fieger's extreme remarks about participants in a pending case, for which he stipulated that reprimand was warranted, it is incumbent upon plaintiffs to articulate something more than a generalized, subjective "chilling" of speech to establish the required injury-in-fact. Specifically, plaintiffs do not suggest that they or any other Michigan attorneys – at present or at any time in the immediate future – intend to make vulgar, crude, or personally abusive remarks about participants in pending cases for which discipline might be threatened under the challenged rules. *See Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 634 (1980) (noting that although overbreadth permits a litigant whose own activities are unprotected to assert the rights of others not before the court, it still requires that the litigant show that the

rights of non-parties have been "substantially abridge[d]."). In fact, plaintiffs do not allege any intended speech or conduct at all. Thus, the purported "chilling effect" of the rules on plaintiffs and on Michigan attorneys, in light of the narrow construction placed on those rules and Fieger's extreme behavior, is objectively unsubstantiated and, accordingly, fails to give rise to an injury-in-fact.

Fieger's contention that he suffers a significant possibility of future harm because he has twice been subjected to disciplinary proceedings under the rules also does not confer standing upon him in the present case. Initially, we note that Fieger no longer hosts the radio show which served as the medium for his sanctioned comments and that the makeup of the Michigan Supreme Court has changed as a result of the recent election. In addition, we observe that during the hearing on the parties' cross-motions for summary judgment before the district court, Fieger's counsel repeatedly and *inaccurately* stated that Fieger had been charged "numerous" and "several" times under the courtesy and civility provisions. In fact, Fieger eventually conceded at the hearing below, in his brief, and at oral argument that he has only twice been "subjected to disciplinary proceedings" under the provisions.

Upon a thorough examination of the facts surrounding those alleged disciplinary proceedings, we conclude that they do not support an injury-in-fact in the present case. In the most recent disciplinary proceeding, which serves as the backdrop for this case

and which arose from Fieger's remarks on his radio show, Fieger admitted that he violated MRPC 3.5(c) and MRPC 6.5(a), stipulated to the sanction of reprimand, and the United States Supreme Court denied review of the Michigan Supreme Court's ruling affirming the sanction and upholding the constitutionality of the courtesy and civility rules. As to the purported second disciplinary proceeding, Fieger's counsel claimed ignorance about its circumstances and relied on information he received from opposing counsel. Opposing counsel stated that "there was a complaint filed," but "I don't believe that there were any formal charges filed against Mr. Fieger in that instance." That Fieger conceded the violation and sanction in the most recent incident and was not charged or sanctioned in the second, combined with his attorney's lack of knowledge about his disciplinary history, preclude us from reasonably extrapolating a "significant possibility" of future injury based on that disciplinary history.[5]

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[5] This case is thus distinguishable from *Fieger v. Ferry*, in which we ruled that Fieger had standing to challenge the application and constitutionality of Michigan's recusal rule, MCR 2.003. 471 F.3d at 640-41. In that decision, we concluded that because Fieger had served as counsel on approximately 38 cases filed in the Michigan Supreme Court and had $90 million in lawsuit awards pending in the State Court of Appeals, there was a "significant, rather than a remote, possibility that Fieger's present and future cases will someday reach the Michigan Supreme Court." *Id.* at 643. We determined, therefore, that it was "likely, rather than speculative, that Fieger will again face the recusal issue that he has faced in past cases." *Id.* at 643-44.

Even *when* a party has been unlawfully sanctioned in the past, we have heeded the Supreme Court's directive that "'past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Grendell,* 252 F.3d at 832 (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983)). While previous sanctions might, of course, be "'evidence bearing on whether there is a real and immediate threat of repeated injury' . . . where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief." *Grendell,* 252 F.3d at 833 (quoting *Lyons,* 461 U.S. at 102).

*Grendell,* a case virtually identical to this case, controls the outcome of this appeal. *Grendell* involved a facial challenge by an attorney to an attorney disciplinary rule. Specifically, Grendell argued that Ohio Supreme Court Practice Rule XIV, § 5 unconstitutionally permits the imposition of sanctions without affording notice and the opportunity to be heard, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. *Grendell,* 252 F.3d at 830. The Ohio Supreme Court had sanctioned Grendell under the challenged rule for filing a frivolous lawsuit. *Id.* at 831. Grendell then asserted a "general constitutional challenge [to the rule] seeking declaratory and injunctive relief." *Id.* Like Fieger, Grendell contended that he had standing to assert a facial challenge to the rule because "the

Ohio Supreme Court's power to sanction attorneys . . . continuously exposes [them] to the 'chilling effect' of the hanging of the 'Sword of Damocles' over them." *Id.* at 833 (internal quotations omitted). Also like Fieger, Grendell emphasized that he had been "previously sanctioned" under the challenged rule, *id.* at 832, and even asserted that his "fear of unconstitutionally imposed sanctions forced him to withdraw from two recent cases before the Ohio Supreme Court." *Id.* at 834.

Despite Grendell's claim of the rule's "chilling effect," his alleged injury arising from his withdrawal from two cases because of fear of sanction, and the court's previous sanction of him under the disciplinary rule, we nevertheless held that Grendell lacked standing to assert a facial challenge to the rule. Specifically, we concluded that the threat of future sanction was "highly conjectural, resting on a string of actions the occurrence of which is merely speculative." *Grendell,* 252 F.3d at 833. We explained that:

> to show a palpable threat of future injury necessary to achieve standing for declaratory and injunctive relief, Grendell must present evidence establishing: (1) that he is bringing or highly likely to bring a lawsuit before the Ohio Supreme Court; (2) that such lawsuit is allegedly frivolous, exposing him to sanctions under Rule XIV, § 5; (3) that the Ohio Supreme Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate

> due process. Such a chain of events is simply too attenuated to establish injury in fact, and to confer the required standing in this case.

*Id.*

Although *Grendell* involved a Fifth Amendment due process challenge, and not a First Amendment challenge, the facts are similar because both cases involve challenges to attorney discipline rules, both attorneys were sanctioned under those rules, and both attorneys alleged "chill" or other harm. Accordingly, our reasoning in *Grendell* is persuasive. Here, paralleling *Grendell,* to show a palpable threat of future injury necessary to achieve standing for declaratory and injunctive relief, plaintiffs must present evidence establishing: (1) that they are now, or highly likely to be, speaking about a pending case; (2) that such speech will concern participants in that case and be vulgar, crude, or personally abusive, exposing them to sanctions under MRPC 3.5(c) or MRPC 6.5(a); (3) that the Michigan Supreme Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate plaintiffs' First Amendment rights. As in *Grendell,* we conclude that such a chain of events is simply too attenuated to establish the injury in fact required to confer standing.

*Grendell* relied on the Supreme Court's decision in *Lyons.* In *Lyons,* the plaintiff sought to enjoin the Los Angeles Police Department ("L.A.P.D.") from using chokeholds, which had caused several injuries

and deaths during arrests, including injury to Lyons himself. *Lyons,* 461 U.S. at 97-98, 100. The complaint alleged that the L.A.P.D.,

> "pursuant to the authorization, instruction, and encouragement of Defendant City of Los Angeles, regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever," that numerous persons have been injured as the result of the application of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that Lyons "justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse."

*Id.* at 98. Despite the allegations of widespread injury and even though the L.A.P.D. had previously used the chokehold against Lyons himself, the Supreme Court nevertheless held that the future threat of injury was too speculative to support Lyons's standing to challenge the constitutionality of the department's use of chokeholds. *See Grendell,* 252 F.3d at 833 (discussing *Lyons*). In reversing the Ninth Circuit's entry of an injunction prohibiting the use of chokeholds in certain situations, the Court stated:

> Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons' standing

> to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

*Lyons*, 461 U.S. at 105.

Here, the justification for plaintiffs' standing is even less robust than it was for Lyons's standing. Not only had Lyons been injured by the chokehold, *id.* at 97-98, but he also alleged that the L.A.P.D.'s use of the chokehold was pursuant to a policy, regular and routine practice, and even *encouragement*. *Id.* at 98. Neither Fieger nor Steinberg contends that the Michigan Supreme Court or its investigative disciplinary arm are improperly wielding MRPC

3.5(c) or MRPC 6.5(a) to regularly discipline attorneys for their speech, nor do we find any information in the record to support such an inference. In fact, plaintiffs identify no other attorneys, other than Fieger himself, who have been disciplined under MRPC 3.5(c) or MRPC 6.5(a) for criticizing the Michigan judiciary.

Moreover, plaintiffs do not contend that the attorney disciplinary authorities in Michigan are specifically targeting them for sanction under the challenged rules.[6] In fact, the district court noted that Fieger is "a vocal, often harsh, and at times vulgar critic of Michigan's judiciary." Despite his significant history of criticizing Michigan's judges, it is revealing that Fieger's record consists of a single, isolated reprimand under the challenged provisions. Based on that history, Fieger has failed to demonstrate a reasonable threat of future sanction. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (holding that fears of prosecution "that are imaginary or speculative" do not offend free-speech rights).

*Grendell* also relied on *Ashcroft v. Mattis*, 431 U.S. 171 (1977). In that case, the Supreme Court vacated an en banc decision of the Eighth Circuit and

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[6] The absence of such allegations again distinguishes this case from *Fieger v. Ferry*, in which Fieger alleged in his complaint that the justices on the Michigan Supreme Court were "actively pursuing disciplinary proceedings against him before the Attorney Grievance Commission." 471 F.3d at 640.

remanded the case to the district court with instructions to dismiss the complaint for lack of standing. *Id.* at 173. In *Mattis,* police shot and killed the appellee's eighteen-year old son while the son attempted to escape arrest. *Id.* at 171. The father sought a declaration that the state statute which authorized police to use deadly force in apprehending a person who committed a felony was unconstitutional. *Id.* In support of standing, the complaint alleged that the father "has another son who 'if ever arrested or brought under an attempt at arrest on suspicion of a felony, might flee or give the appearance of fleeing, and would therefore be in danger of being killed by these defendants or other police officers. . . .'" *Id.* at 172 n.2. The Court, however, ruled that "[s]uch speculation is insufficient to establish the existence of a present, live controversy." *Id.* Resisting the urge to resolve the merits of the appeal and instead obeying its constitutional mandate, as we do now, the Court stated:

> Although we are urged to consider the merits of the Court of Appeals' holding, we are unable to do so, because this suit does not now present a live "case or controversy." This suit was brought to determine the police officers' liability for the death of appellee's son. That issue has been decided, and there is no longer any possible basis for a damages claim. Nor is there any possible basis for a declaratory judgment. For a declaratory judgment to issue, there must be a dispute

> which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts. Here, . . . appellee's primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's death was wrongful. Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement. . . .

*Id.* at 172-73.

The *Mattis* Court's holding as to the proper method of consideration of constitutional issues is emphasized by the fact that eight years later, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court decided, in a concrete context, exactly the issue that could have been before them in *Mattis*, by holding that indeed it was unconstitutional to use deadly force to apprehend a person who simply had committed a felony. *Id.* at 3. Just as *Garner* ultimately decided in a concrete situation the abstract controversy that was not properly before the Court in *Mattis*, this controversy must await proper jurisdiction for resolution.

As in *Mattis*, we do not ignore the context in which this case has arisen. Although plaintiffs seek a declaration that the courtesy and civility provisions are unconstitutional on their face, that request springs, not from a vacuum, but from an adverse determination by Michigan's highest court of which the United States Supreme Court denied review. We

remind plaintiffs that the court's judgment is not the subject of this appeal because, consistent with *Mattis*, "[t]hat issue has been decided. . . ." *Id.* at 172. Nevertheless, Fieger, like the plaintiff in *Mattis*, attempts to accomplish through the back door what he could not through the front-invalidation of the very rules that he admittedly violated. In this way, Fieger's primary objective resembles that of the plaintiff in *Mattis*: to re-litigate the disciplinary proceedings in Michigan, but this time in federal court. Fieger invites us to void the rules he violated based on sheer speculation of future discipline. We decline the invitation.

C.

None of the cases upon which plaintiffs or the district court relied support plaintiffs' standing to assert a facial challenge to MRPC 3.5(c) and MRPC 6.5(a). In *Steffel v. Thompson*, 415 U.S. 452 (1974), police twice warned the plaintiff and his companion to stop distributing handbills on an exterior sidewalk of a shopping center in protest of American involvement in the Vietnam War. *Id.* at 455. Police threatened to arrest plaintiff and his companion if they did not cease. *Id.* Plaintiff left to avoid arrest. *Id.* Plaintiff's companion, however, continued distributing handbills, and police arrested him and charged him with violating a Georgia criminal trespass statute. *Id.* at 455-56. Plaintiff, although desiring to return to the shopping center to distribute handbills, had not done so because he feared that police would

arrest him as well. *Id.* at 456. "[T]he parties stipulated that, if [plaintiff] returned and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the Georgia statute." *Id.*

In reversing the Fifth Circuit's judgment affirming the district court's dismissal of the complaint on the basis that no case and controversy had arisen, the Supreme Court stated:

> Unlike three of the appellees in *Younger v. Harris,* 401 U.S. [37,] [ ] 41 [(1971)], petitioner has alleged threats of prosecution that cannot be characterized as "imaginary or speculative," *id.,* at 42. He has been twice warned to stop handbilling that he claims is constitutionally protected and has been told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been "chimerical," *Poe v. Ullman,* 367 U.S. 497, 508 (1961). In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. *See, e.g., Epperson v. Arkansas,* 393 U.S. 97 (1968). Moreover, petitioner's challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him. *Cf. Boyle*

*v. Landry,* 401 U.S. 77, 81 (1971); *Watson v. Buck,* 313 U.S. 387, 399-400 (1941).

*Id.* at 459.

*Steffel* is readily distinguishable from this case. The plaintiff in *Steffel,* unlike plaintiffs here, was unambiguous in his intended speech – distributing handbills in a shopping center. Further, the threat of injury in *Steffel,* unlike the threat of injury here, was concrete and imminent – the police had arrived and threatened to arrest plaintiff and charge him with criminal trespass. Police even *stipulated* that they would do so. Here, plaintiffs merely assert that they feel "inhibited," improperly discount the conduct which led to the reprimand, assert a nebulous desire to criticize Michigan's judiciary without considering the impact of the narrow construction of the challenged rules articulated by the Michigan Supreme Court, and then speculate about the possible result of their conduct. Fieger has not acted analogously to the plaintiff in *Steffel* by, for example, unambiguously alleging that he plans to or wishes to make a similar or identical speech about some recent case he has lost or specifically intends to use the same language in the event that he loses any of a number of specific pending cases. His allegations are simply insufficient to confer standing.

*MedImmune, Inc. v. Genentech, Inc.,* 127 S. Ct. 764 (2007), another case relied upon by plaintiffs and the district court, is also distinguishable. In *Genentech,* a patent licensee paid royalties that it did not believe

it owed because had it refused, it would have exposed itself to treble damages, attorney's fees, and an injunction prohibiting it from selling a product that accounted for more than eighty percent of its sales revenue. *Id.* at 767-68. The Federal Circuit affirmed the district court's conclusion that because the licensee had paid the royalties, albeit under protest, such payment extinguished the case and controversy and prohibited entry of a declaratory judgment. *Id.* at 768. The Supreme Court reversed and held that Article III's case-or-controversy requirement, as reflected in the "actual controversy" requirement of the Declaratory Judgment Act, did not require the licensee to terminate its license agreement, breach the agreement, or expose itself to legal repercussions before it could seek a declaratory judgment that the underlying patent was invalid, unenforceable, or not infringed. *Id.* at 767. Writing for the Court, Justice Scalia stated:

> Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

*Id.* at 772. In other words, a plaintiff need not "bet the farm, so to speak, by taking the violative action." *Id.*

We agree that the purpose of the Declaratory Judgment Act is to ameliorate the dilemma posed by "putting the challenger to the choice between abandoning his rights or risking prosecution." *Id.* at 773 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). However, the Declaratory Judgment Act does not trump the Constitution. Plaintiffs ignore the Supreme Court's crucial observation in *Genentech* that:

> There is no dispute that [the case and controversy] standards would have been satisfied if petitioner had taken the final step of refusing to make royalty payments under the 1997 license agreement. Respondents claim a right to royalties under the licensing agreement. Petitioner asserts that no royalties are owing because the Cabilly II patent is invalid and not infringed; and alleges (without contradiction) a threat by respondents to enjoin sales if royalties are not forthcoming. *The factual and legal dimensions of the dispute are well defined and, but for petitioner's continuing to make royalty payments, nothing about the dispute would render it unfit for judicial resolution.*

*Id.* at 771-72 (emphasis added). Thus, *Genentech*, like *Steffel*, involved a "well defined" dispute appropriate for judicial resolution. Plaintiff's intended conduct in *Genentech* – making or refusing to make royalty

payments under an agreement – was obvious and the threat of injury was imminent and concrete. Here, plaintiffs make vague, non-specific allegations of their intended speech and conduct under an attorney discipline rule that has been applied to extreme conduct and narrowed by construction. They then speculate that injury will result from merely criticizing the Michigan judiciary. In that context, future injury is conjectural, and the "dispute" is amorphous, rendering it "unfit for judicial resolution."

*Freedman v. Maryland,* 380 U.S. 51 (1965), involved a constitutional challenge to a state motion picture censorship statute arising from an appeal from a criminal conviction for violating that statute. *Id.* at 52. In reversing the state court's conclusion that the appellant lacked standing to assert his constitutional claim, the Supreme Court stated: "Appellant has not challenged the submission requirement in a vacuum but in a *concrete* statutory context." *Id.* at 56 (emphasis added). The Court explained:

> "In substance, [appellant's] argument is that, because the apparatus [of censorship] operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits. . . ."

*Id.* at 57. Thus, *Freedman,* like *Steffel* and *Genentech,* involved a concrete dispute.

In *Dombrowski v. Pfister,* 380 U.S. 479 (1965), the Supreme Court concluded that plaintiffs had standing to challenge the constitutionality of Louisiana's Subversive Activities and Communist Control Law in the midst of a criminal prosecution for violating that law because the government exploited the statute for improper purposes, namely, to target and harass them. *Id.* at 482. The complaint, *supported* by affidavits and a written offer of proof, alleged that:

> the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.

*Id.* The Court noted that, despite a prior criminal proceeding in which a state judge quashed the arrest warrants because they were not based on probable cause, discharged the appellants, and then granted a motion to suppress seized evidence because a raid against appellants' offices was illegal, "Louisiana officials continued, however, to threaten prosecution of the appellants. . . ." *Id.* at 488. Appellants then filed their action seeking declaratory and injunctive relief. *Id.* A state judge entered a temporary restraining order prohibiting prosecutions under the statute pending a hearing and decision by the district court. *Id.* When the district court dissolved the

temporary restraining order and dismissed the complaint for failure to state a claim upon which relief could be granted and on abstention grounds, a grand jury then returned indictments against the individual appellants under the statute. *Id.*

In concluding that the complaint alleged "sufficient injury to justify equitable relief" and that the district court erred in dismissing it, the Court explained:

> These events, together with repeated announcements by appellees that the appellant organization is a subversive or Communist-front organization, whose members must register or be prosecuted under the Louisiana statutes, have, appellants allege, frightened off potential members and contributors. Seizures of documents and records have paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause. Although the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse.
>
> . . .
>
> Not only does the complaint allege far more than an "injury other than that incidental to every criminal proceeding brought lawfully and in good faith," but appellants allege threats to enforce statutory provisions other

> than those under which indictments have been brought. Since there is no immediate prospect of a final state adjudication as to those other sections – if, indeed, there is any certainty that prosecution of the pending indictments will resolve all constitutional issues presented – a series of state criminal prosecutions will not provide satisfactory resolution of constitutional issues.

*Id.* at 488-89 (citations omitted). Further, the Court determined that the district court erred in abstaining from adjudication pending authoritative interpretation of the statutes by Louisiana's courts, explaining:

> First, appellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities.
>
> . . .
>
> [A]n interpretation rendering the statute inapplicable . . . would merely mean that appellants might ultimately prevail in the state courts. It would not alter the impropriety of appellees' invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities, as appellees allegedly are doing and plan to continue to do.

> Second, appellants have challenged the statutes as overly broad and vague regulations of expression. We have already seen that where, as here, prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity.

*Id.* at 490-91 (citations omitted).

Again, the case before us is clearly distinguishable from *Dombrowski* for two reasons. First, this case does not arise in the midst of a criminal prosecution or disciplinary proceeding. Neither Fieger nor Steinberg is currently being threatened with discipline under the courtesy and civility rules. Second, we again emphasize that plaintiffs make no allegation and have not provided any evidence to support an inference that the Michigan Supreme Court is targeting them, harassing them, or broadly applying the courtesy and civility provisions to Michigan's attorney population for the purpose of stifling fundamental freedoms. If that were the case, Fieger presumably would have a lengthy disciplinary record and would have asserted such allegations during his disciplinary proceeding in an effort to convince a federal court to hear the case

without abstaining.[7] For these reasons, plaintiffs have not presented an injury in fact.

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[7] *Dombrowski* demonstrates why plaintiffs are incorrect in their assertion that:

> [t]o argue that Plaintiffs do not have standing to challenge the "courtesy" provisions would result in an intolerable trick. The trick begins by arguing that Plaintiffs do not have standing to prospectively challenge the "courtesy" provisions of the rules as unconstitutional because there is no pending grievance or proceeding against Mr. Fieger. But if there was a pending grievance or proceeding, Defendant would assuredly assert (and have successfully asserted in this case) that the Court must abstain from deciding Plaintiffs' claims. By arguing lack of standing together with abstention, Defendants are asking the Court to lock the doors to the courthouse; for there would *never, ever* be jurisdiction under such circumstances.

Adopting plaintiffs' argument, the district court stated:

> It should also be noted that if this Court were to adopt Defendants' standing argument, Plaintiffs would be stuck in a procedural rabbit hole that would result in Plaintiffs being forever precluded from possessing the requisite standing required for federal review.
>
> When Plaintiffs first raised the facial challenge to the courtesy provisions at a time when a state grievance was pending, Defendants argued that abstention was required. This Court agreed. Now that the proceeding is not pending, Defendants claim that Plaintiffs lack standing to prospectively challenge the provisions because there is no pending grievance or proceeding. At oral argument, Defendants were asked repeatedly if there would ever be a situation where a plaintiff would possess the requisite standing to facially challenge the courtesy provisions in a federal

(Continued on following page)

IV.

For the same reasons already articulated, we also conclude that the district court abused its discretion in entering a declaratory judgment under the Declaratory Judgment Act. *See Scottsdale Ins. Co. v. Roumph,* 211 F.3d 964, 967 (6th Cir. 2000) ("This court reviews the district court's exercise of discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), for abuse of discretion.").

> Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute

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court. . . . Defendants' response [was] too limited and would likely cause issues concerning the existence of an actual case or controversy to arise.

*Dombrowski* proves that, under a proper set of facts, a plaintiff alleging a violation of the federal Constitution in a pending state grievance or other proceeding *could* have standing and that a federal court would be *required* to intervene in the proceeding without abstaining. Indeed, the Supreme Court in *Dombrowski* remanded the case to the district court and ordered it to determine the issues raised in the complaint without abstaining. *Dombrowski,* 380 U.S. at 497-98. Further, 28 U.S.C. § 1257(a) authorizes the Supreme Court to review a final judgment or decree rendered by the highest court of a state where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution of the United States. In this case, federal intervention has simply not been justified. That is not to say, however, that under an appropriate set of facts, federal court jurisdiction would not be proper.

> provides that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration[.]" The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface. . . . When all is said and done, we have concluded, "*the propriety of a declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.*"

*Roumph*, 211 F.3d at 969 (quoting *Wilton*, 515 U.S. at 286-87)) (citations omitted) (emphasis added). The present filing, which involves "a close nexus between the underlying factual and legal issues and state law and/or public policy," *id.* at 968 (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995)), is, absent a proper injury in fact and circumstances suggestive of illegitimate exercises of authority by the Michigan Supreme Court under the federal Constitution, a case that would "increase the friction between our federal and state courts and improperly encroach on state jurisdiction." *Roumph*, 211 F.3d at 968.

V.

We hold that plaintiffs lack standing to assert a facial challenge to MRPC 3.5(c) and 6.5(a) because they have failed to demonstrate actual present harm

or a significant possibility of future harm based on a single, stipulated reprimand. Moreover, plaintiffs have not articulated, with any degree of specificity, their intended speech and conduct and have not sufficiently established a threat of future sanction under the narrow construction of the challenged provisions by the Michigan Supreme Court. For the same reasons, we conclude that the district court abused its discretion in entering declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201(a).[8]

Accordingly, the judgment of the district court is vacated, and the case is remanded to the United States District Court for the Eastern District of Michigan with instructions to dismiss the complaint for lack of jurisdiction.

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## DISSENT

MERRITT, Circuit Judge, dissenting. Rule 3.5(c) of the Michigan Rules of Professional Conduct provides that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal." Rule 6.5(a) provides that "a lawyer shall treat with courtesy and respect all persons involved in the

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[8] In view of our disposition, it is unnecessary for us to address the additional issues raised by appellants.

legal process." No other jurisdiction places such potentially sweeping restrictions on attorney speech.[1] Plaintiffs Geoffrey Fieger and Richard Steinberg brought suit under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), seeking a declaration that these "courtesy and civility" provisions are unconstitutionally vague and overbroad. The district court concluded that the suit presented an actual controversy that would be appropriately resolved by issuing declaratory relief. The majority now reverses both of those decisions. Because I believe that the requirements for standing under the Declaratory Judgment Act require a different result, I respectfully dissent.

The majority first errs by falsely claiming that these Rules are narrow and that the Michigan Supreme Court has given the Rules an even narrower construction. The majority opinion also completely fails to understand that the recent case of

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[1] The old version of the American Bar Association's Model Rule of Professional Conduct 3.5 prohibited a lawyer "appearing in his professional capacity before a tribunal" from "engag[ing] in undignified or discourteous conduct which is degrading to a tribunal." The ABA subsequently changed this Rule to provide that a lawyer shall not "engage in conduct intended to disrupt a tribunal." Of the forty-five jurisdictions that base their rules on the ABA Rules, only three others besides Michigan retain a reference to "undignified or discourteous conduct," and each of those three includes a further requirement that the conduct be "degrading" or "disrupting" to the tribunal. *See Grievance Adm'r v. Fieger*, ADB #01-055-GA at *6-13 (2004) (surveying other jurisdictions and concluding that Michigan's Rule 3.5(c) "appears to be unique" in its breadth).

*MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), clearly establishes the proposition that, in free-speech cases brought under the Declaratory Judgment Act, credible threats of *governmental* suppression create standing for individuals who face a realistic danger of prosecution.

## I. The Challenged Rules

I begin with a brief discussion of the Rules in question, since their reach is relevant to plaintiffs' standing to challenge them. The majority repeatedly emphasizes the importance of "the narrow construction" given to the challenged Rules by the Michigan Supreme Court. This "narrow construction" purportedly undermines plaintiffs' ability to establish standing because plaintiffs have not alleged that they "intend to make vulgar, crude, or personally abusive remarks about participants in pending cases." *Supra* at 13; *see also id.* (noting that "the narrow construction placed on" the Rules is the backdrop against which the standing analysis is undertaken).

I find it impossible to read the Michigan Supreme Court's construction of the Rules as "narrow" in any significant way. The majority appears to read the opinion to say that the Rules apply *only* to vulgar, crude, or personally abusive remarks. If that were so, this would be a different case. But the Michigan Supreme Court merely said that the Rules clearly apply to such remarks, without suggesting that they do not apply elsewhere. In its discussion of

vagueness, the Court avoided clarifying the Rules' potential reach, noting that Fieger's vagueness challenge "cannot be successfully advanced here because there is no question that even the most casual reading of these rules would put a person clearly on notice that the kind of language used by Mr. Fieger would violate MRPC 3.5(c) and MRPC 6.5(a)." *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 139 (Mich. 2006). In addition to missing the very point of a vagueness challenge, this passage is indicative of the lack of any narrowing construction in the opinion – the Court says that the Rules clearly apply to certain speech, without suggesting any other speech to which they do not apply. To be sure, the Court emphasizes that the Rules do not prohibit all criticism of judges, instead governing only "the form and manner of such criticism." *Id.* at 144. But that merely raises the question of what forms and manners of criticism are considered "undignified," "discourteous," or lacking in "respect." Comparing judges to Hitler and Goebbels evidently falls on the wrong side of the line. But would it be permissible to vary the "form and manner" of criticism, and say that the judges had "behaved dictatorially"? Saying that a judge is a "jackass" appears to be impermissible (despite the fact that the word is a non-vulgar name for a donkey). But would it be permissible to vary the "form and manner" and say that he is a "stubborn idiot," a "right-wing radical," a "doctrinaire ideologue," or "driven by party politics"? Or, for that matter, to say that he is an incompetent jurist whose presence on the bench is a disgrace? Nothing in the opinion

suggests where the line between permissible and impermissible form might lie. In sum, the Michigan Supreme Court says that lawyers are free to criticize judges, but may only do so in a manner that shows courtesy and respect. The vagueness – and potential reach – of this requirement hardly needs further elaboration.

Not only did the Michigan Supreme Court fail to give the Rules a meaningful limiting construction, it actually expanded the reach of the Rules in several key respects. First, it held that the phrase "all persons involved in the legal process," as used in Rule 6.5(a), includes judges, who therefore must be "treat[ed] with courtesy and respect." If there was any meaningful difference between a prohibition against "undignified or discourteous conduct," on the one hand (which arguably left some leeway for vigorous criticism), and an affirmative duty to treat judges with "courtesy and respect," on the other (which seemingly leaves no such room for criticism), that difference has been made moot, since both provisions now govern attorney conduct toward judges. Second, the Court construed the phrase "toward the tribunal," as used in Rule 3.5(c), to include any statement made "with respect to" the tribunal. *See id.* at 137. This expansive reading of the Rule, which had never previously been applied to an attorney's public comments, *see Grievance Adm'r v. Fieger*, ADB #01-055-GA (2004), means that any public criticism of judges is now potentially subject to disciplinary action. Finally, in its discussion of the

Rules' inevitably "flexible" enforcement standards, *see Grievance Adm'r*, 719 N.W.2d at 255, the Court notes that the State's interest in limiting attorney speech is greater when cases are pending. From there, it adopts a technical definition of the word "pending" to conclude that the State has a strong interest in vigorous enforcement even after an appellate court has rendered its judgment, so long as the "time for filing an application for leave to appeal to the Supreme Court," which is now twenty-one days, has not expired. *Id.* at 135-36. Thus, an attorney's criticism of a recently rendered appellate court decision is treated identically to an attorney's criticism of the court in an ongoing jury trial.[2] This reasoning takes us far afield of the purpose of the rule regarding pending cases, which is concerned with preventing unfairness to the parties and disruption of the legal system. *See, e.g.*, Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161 (2008) (explaining that the "Supreme Court has held that attorneys' First

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[2] The Court does not even stop there. It says that the Rules apply to all pending cases (giving that term an expansive reading, as noted), but declines to say that Rules do not apply to non-pending cases. *See Grievance Adm'r*, 719 N.W.2d at 136 ("It is also unnecessary for us to decide, and we do not decide here, the limits our civility rules place on lawyers after a case has been completed.").

Amendment rights must be balanced against litigants' right to fair and impartial adjudications").[3]

In sum, the Michigan Supreme Court's construction of the challenged Rules cannot accurately be described as "narrow." The Court not only failed to limit or clarify the language in any meaningful way, it held that the Rules apply in ways that they had never done before, paving the way for more expansive enforcement in the future. It is against this backdrop that plaintiffs' standing should be evaluated.[4]

## II. Standing

Standing to bring suit under the Declaratory Judgment Act is subject to different requirements

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[3] As noted, *supra* note 1, it is instructive to compare Michigan Rule of Professional Conduct 3.5, prohibiting "undignified or discourteous conduct toward the tribunal," with the American Bar Association's Model Rule of Professional Conduct 3.5, which prohibits "conduct intended to disrupt a tribunal." As commentators have noted, "[i]f a lawyer takes action outside a courtroom setting, it is virtually impossible to 'disrupt' a tribunal." GEOFFREY C. HAZARD, JR., ET AL., THE LAW OF LAWYERING § 31.6, 31-8 (3d ed. 2004). Thus, Michigan appears to be unique in saying that its rules concerning attorney speech towards a tribunal apply outside of the courtroom.

[4] I also note in passing that this case presents an unusual concentration of power in one branch of government: the Michigan Supreme Court in effect makes, enforces, and interprets the laws relating to the criticism of its members. Basic separation-of-powers principles and common sense should cause us to approach such laws with a healthy degree of skepticism.

than standing to sue for damages or an injunction. The majority blurs these requirements by demanding that plaintiffs demonstrate a pattern of disciplinary actions so consistent that we can infer inevitable and imminent future harm. While this standard might be appropriate to a suit for injunctive relief, it is inappropriate to a suit for declaratory relief.

In *MedImmune, Inc. v. Genentech, Inc.*, the Supreme Court explained that, when analyzing standing in declaratory-judgment actions, "'the question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" 549 U.S. at 127 (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). There seems to me to be little question that the free-speech controversy here (which requires a straightforward assessment of the Rules' facial validity) is substantial, definite, and concrete, and that the parties have adverse legal interests. The only point of debate, then, concerns whether the controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. It bears emphasis that this test does not require plaintiffs to violate the law and await actual prosecution: "[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to

be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." *Id.* at 772.[5] A controversy possesses sufficient immediacy and reality if a plaintiff faces "a realistic danger" or "credible threat" of the law being enforced against him. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). This standard is met "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative" and a plaintiff has asserted that he

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[5] The Court in *MedImmune* drew on *Steffel v. Thompson*, 415 U.S. 452 (1974), a case in which the plaintiff did not have to "proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution," explaining:

> As then-Justice Rehnquist put it in his concurrence, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." [*Steffel*, 415 U.S.] at 480. In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do. . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. *See Terrace* [*v. Thompson*, 263 U.S. 197, 215-16 (1923)]; *Steffel*, [415 U.S.] at 459. The dilemma posed by that coercion – putting the challenger to the choice between abandoning his rights or risking prosecution – is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

*MedImmune*, 549 U.S. at 129.

intends to engage in behavior that appears to be prohibited by the text of a vague law. *Id.* at 303. This is true even where the challenged law has never been applied to the plaintiff and *may not be* in the future. *Id.* at 302. Therefore, a plaintiff has standing to seek declaratory relief when he has alleged an intention to engage in behavior that, if undertaken, would raise a realistic danger of government prosecution.

Fieger has easily satisfied this requirement and thus has standing.[6] He has alleged that he intends to continue being an outspoken critic of the Michigan judiciary. If history is any guide, much of that future criticism could very plausibly be described as "discourteous," putting him in realistic danger of prosecution. The fact that disciplinary action has "only" been brought against him twice does not undermine standing in this context, as the majority contends; it buttresses it.

It is also worth noting that the majority's apparent demand for detailed allegations about the sorts of decisions that Fieger will criticize and the specific language that he will use is particularly inappropriate in a suit for a declaration concerning the *facial* validity of the Rules. If plaintiffs had sought a declaration that certain specific actions could not be punished under the Rules – that is, "a pre-application, as-applied challenge," *Adult Video*

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[6] Because Fieger, in my view, has standing, it is unnecessary to address whether Steinberg also has standing.

*Ass'n v. U.S. Dep't of Justice,* 71 F.3d 563, 567 (6th Cir. 1995) (emphasis omitted) – it would be appropriate to require that they allege the behavior with a high degree of specificity and demonstrate the likelihood that they will undertake that behavior in the future. But where they seek a declaration that the law, on its face, is unconstitutionally vague and overbroad, what is the point of having plaintiffs' standing turn on the specificity of their planned conduct? A facial challenge to the Rules will be resolved by reference to the text of the Rules and any limiting constructions Michigan courts have given them; the specific conduct that gave rise to the facial challenge is of little relevance and should not be determinative of the existence of a case or controversy.

Finally, I do not believe that my colleagues have given sufficient weight to the District Court's conclusions about the existence of a controversy and the appropriateness of issuing declaratory relief. "[T]he existence of an actual controversy and the adequacy of declaratory relief to resolve it are issues often presenting particular difficulty in declaratory judgment actions, and it is to these issues that judicial discretion in such actions is primarily directed." *Perez v. Ledesma,* 401 U.S. 82, 123-24 (1971) (Brennan, J., concurring in part and dissenting in part). As the Court recently reiterated, it is "more consistent with the [Declaratory Judgment Act] . . . to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory

judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *MedImmune,* 549 U.S. at 136 (quotations omitted). The standing question here is not close or subject to reasonable debate among lawyers who understand the law; but if it were, we should give a strong version of deference to the District Court's conclusion that an actual controversy fit for judicial resolution exists.

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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| GEOFFREY NELS FIEGER & RICHARD L. STEINBERG, | CIVIL ACTION NO. 06-11684 |
| PLAINTIFFS, | HONORABLE ARTHUR J. TARNOW UNITED STATES DISTRICT JUDGE |
| V. | |
| MICHIGAN SUPREME COURT, *ET AL.*, | MAGISTRATE MONA K. MAJZOUB |
| DEFENDANTS. / | |

## OPINION

(Filed Sep. 4, 2007)

Pursuant to the Declaratory Judgment Act, Plaintiffs Fieger and Steinberg raise constitutional challenges to the Michigan Rules of Professional Conduct ["MRPC"] 3.5(c) and 6.5(a), often referred to as the courtesy and civility provisions ["courtesy provisions"]. Enacted by the Michigan Supreme Court, these rules place restrictions on attorney conduct, including attorney speech. MRPC 3.5(c) applies to attorney conduct directed toward tribunals, whereas MRPC 6.5(a) relates to attorney conduct toward all persons involved in the legal process. Plaintiffs raise facial challenges to these courtesy provisions arguing that they violate both the First Amendment right to free speech and the Due Process Clause of the Fourteenth Amendment because they are overly broad and vague.

While Plaintiff Fieger was reprimanded under the challenged rules, Plaintiff Steinberg was not. *Griev. Adm'r v. Fieger*, 476 Mich. 231 (2006). This is not a challenge to the discipline imposed. Rather the *Fieger* decision is cited for Michigan's interpretation of the rules.

The Court finds the rules are unconstitutional on their face because they are both overly broad and vague. Thus, they violate the First Amendment right to free speech and the Fourteenth Amendment right to due process of law.

As interpreted by the Michigan Supreme Court, the State of Michigan's effort to regulate unprotected speech through the courtesy provisions causes a substantial amount of protected speech to be regulated as well. In addition, the courtesy provisions are so imprecise that persons of ordinary intelligence must guess at their meaning. Although it has long been recognized that states have legitimate interests in restricting attorney speech both to protect the fair administration of justice and to preserve the judiciary's integrity as well as the public's perception of it, these interests do not extinguish a Michigan attorney's First and Fourteenth Amendment constitutional rights to free speech and due process. Limiting an attorney's extrajudicial criticism of a branch of government in the name of preserving the judiciary's integrity is likely to have an unintended, deleterious effect upon the public's perception, since attorneys are often best suited to assess the performance of

judges. As Supreme Court Justice Hugo Black wrote for the majority in *Bridges v. California:*

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

314 U.S. 252 (1941).

This Court finds there are no procedural bars to addressing the merits. Plaintiffs have standing to raise these challenges. Plaintiffs' claims are ripe for adjudication and are not barred by the doctrines of *res judicata* or claim preclusion. Finally, Defendants are not shielded by any doctrine of immunity.

There is

> a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (U.S. 1964).

In this case, the vague and overbroad courtesy provisions' that enforce silence in the name of preserving the dignity of the bench, does not override an attorney's right to speak her mind against public institutions, especially an elected judiciary, regardless of whether that speech is in good taste.

## I. Merits

### A. Declaratory Judgment Act

The power to hear cases under the Declaratory Judgment Act ["Act"] is discretionary. 28 U.S.C. § 2201(a); *see also Adrian Energy Assocs. v. Mich. PSC*, 481 F.3d 414, 421 (6th Cir. 2001) (Section 2201(a) "of the Act gives district courts statutory discretion to decide whether to entertain actions for declaratory judgments. Section 2201 explicitly provides that 'any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration.'") When deciding whether to exercise jurisdiction in a declaratory judgment action, courts are to look to five factors:

> (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations issues; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for *res judicata*'; (4) whether the use of a declaratory action would increase the friction

> between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

*Scottsdale Ins. Co. v. Roumph,* 211 F.3d 964, 965-68 (6th Cir. 2000).

Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party bears the initial responsibility of demonstrating that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). All inferences must be made in a light most favorable to the nonmoving party. *Matsushita Electrical Industrial Co. V. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

In this case, a declaratory judgment finding the courtesy provisions vague and overbroad is appropriate. This judgment settles the controversy and clarifies the legal relations without encroaching on state jurisdiction.

### B. Legitimate Interest

Political speech – speech about government issues or government officials – is "at the core of what the First Amendment is designed to protect." *Morse v.*

*Frederick,* 127 S. Ct. 2618, 2626 (U.S. 2007) (citation omitted).

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

*Mills v. Alabama,* 384 U.S. 214, 218 (1966).

Since the judiciary is one branch of government and because "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment," it follows that attorney speech concerning a court's actions in a case is political speech. *Shelley v. Kramer,* 334 U.S. 1, 14 (1948).

In *Landmark Communications, Inc. v. Virginia,* the Supreme Court stated,

> [a]lthough it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions. The operations of the courts and the judicial conduct of judges are matters of utmost public concern.

*Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 839 (U.S. 1978). Speech that concerns public affairs "is more than self-expression; it is the essence

of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964).

It should also be noted that an attorney's speech relating to a matter before a court is when an interest in that matter is likely at its height and when the speaker would have the widest audience for her ideas. *Bridges,* 314 U.S. at 268. Moreover, an attorney's speech during the pendency of a case can be beneficial to an individual client, to whom the attorney owes many duties, in terms of: 1) swaying the court of public opinion by countering adverse publicity; 2) gathering crucial evidence; 3) encouraging settlement; 4) and engaging the public in discourse surrounding the issues of import in the particular case. *See* Erwin Chemerinsky, "Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment," 47 EMORY L.J. 859 (1998).

Despite the possible political importance of attorney speech and speech concerning pending cases, courts have affirmed certain restrictions to these categories to promote two separate but related interests. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1066 (1991); *In re Snyder,* 472 U.S. 634 (1985); *In re Sawyer,* 360 U.S. 622 (1959); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.,* 496 U.S. 91 (1990); *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984).

The first and most immediate interest that rules of professional conduct, court rules and court orders

seek to protect by restricting attorney speech is a party's right to a fair trial for the pending proceeding. This interest is often referred to as the fair administration of justice. "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will rebound to the detriment of the accused or that will obstruct the fair administration of justice." *Neb. Press Assn. v. Stuart,* 427 U.S. 539, n. 27 (1976) (J., Brennan concurring). Most often these regulations take the form of rules of professional conduct relating to pretrial publicity and pre-trial gag orders. *Gentile, supra* (upholding rule of professional conduct and invalidating the safe harbor provision; *Neb. Press Assn., supra* (addressing the constitutionality of prior restraints of a gag order on the press to protect a fair trial, not specifically attorney speech).

In *Gentile,* an attorney who held a press conference a day after his client's indictment accusing government officials of being corrupt was later disciplined under a rule of professional conduct relating to these extrajudicial statements. 501 U.S. at 1033-34. The Supreme Court held that Nevada's Rule of Professional Conduct which prohibited attorney speech that has a substantial likelihood of materially prejudicing an adjudicatory proceeding adhered to the principles of the First Amendment but was void for vagueness as interpreted. *Id.* at 1048; 1076.

The second, related but more general interest involves preserving the integrity of the legal process and the public's respect for the institution. The

interest concerns the prejudice to the judiciary as a whole, as opposed to the prejudice in a particular case. Thus, the interest is a concern even when a case may not be pending.

In *In re Snyder*, the attorney speech at issue occurred when no case was pending making the interest in the fair administration of justice moot. The Supreme Court reversed the affirmation of an attorney's suspension and discipline for writing an ill-mannered letter criticizing the federal court's payment procedures for appointed counsel to a court employee charged with administrative responsibilities despite the general interest in prohibiting conduct prejudicial to the interests of justice. 472 U.S. at 645-46.

In addition, in *In re Sawyer*, during a high-profile criminal trial an attorney for one of the defendants made a public speech in which she described the "horrible and shocking" things that occurred at trial, the impossibility of a fair trial, the necessity of scrapping the rules of evidence if the government's case were proved, and the creation of new crimes unless the trial were stopped at once. 360 U.S. at 628-631. The attorney received a one year suspension for her comments because she

> participated in a willful oral attack upon the administration of justice . . . and by direct statement and implication impugned the integrity of the judge presiding therein . . . and thus tended to also create disrespect for

> the courts of justice and judicial officers generally . . .

*Id.* at 623-626.

The Supreme Court noted that attorney speech made during the course of the trial that may obstruct justice may be more censurable, but found that the "charges and findings in [this case] no way turn on an allegation of obstruction of justice." *Id.* at 636. In terms of impugning the integrity of the local courts, the majority determined that the record did not support the charge. *Id.* at 628.

This distinction between these interests was discussed in *Bridges v. California,*

> the substantive evil . . . sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice.

314 U.S. at 270.

In *Bridges,* the general interest in protecting the integrity of the bench was found to be not nearly as compelling because "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." *Id.* Instead, "the other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which would touch upon pending litigation." *Id.* at 271.

Although this interest distinction is not explicitly detailed in ensuing United States Supreme Court cases, the fact that this broad interest alone has not been relied upon to uphold an attorney speech regulation is telling. *See In re Snyder, supra; In re Sawyer, supra.* The interest in protecting the fair administration of justice is a more compelling interest than protecting the respect for the judiciary as a whole. This was acknowledged in *In re Sawyer,* where the Court stated, "[r]emarks made during the course of a trial might tend to such obstruction of justice where remarks made afterwards would not." 360 U.S. at 636.

Both interests are based, at least in part, on the premise that attorneys have a unique position as officers of the court.

> Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause a person to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial process that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

*In re Snyder,* 472 U.S. at 644-45.

Restricting an attorney's freedom of speech in certain instances "reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice." *Id.* at 644.

In terms of restricting attorney speech within the confines of the courtroom,

> [i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.

*Gentile,* 501 U.S. at 1071. In *Gentile,* the Supreme Court clarified that in promoting the fair administration of justice restrictions could extend beyond the courtroom during pending litigation.

> Even outside the courtroom . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be.

501 U.S. at 1071.

The majority in *Gentile* determined that because lawyers who represent clients in pending criminal cases are "key participants in the criminal justice system, the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074. As a result,

> [b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to fairness of a pending

> proceeding since lawyers' statements are likely to be received as especially authoritative.

*Id.* at 1074.[1]

However where an attorney's speech is regulated that is removed from the courtroom, courts have "engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Id.* at 1073. Thus, the further an attorney's speech is from the judicial process or the closer it is to the end of a pending case, the less weight that should be given to a State's interests in regulating this specialized profession.

In *Gentile,* the Supreme Court rejected the argument that attorneys should only be subject to discipline if there were a "clear and present" danger to the fair administration of justice. *Id.* at 1070-1075. Instead, the 5-4 majority held that the ethical rule relating to pretrial publicity in a criminal case which restricted speech that creates a "substantial

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[1] The Supreme Court did not discuss whether pending criminal cases were different than pending civil cases in the context of pervasive regulation of attorney speech. It should be noted that *In re Sawyer,* 360 U.S. 622 1959), relied upon by both the Michigan Supreme Court in *Griev. Adm'r v. Fieger, infra,* and the Supreme Court in *Gentile* to expand the scope of attorney speech regulations also involved the regulation of attorney speech in order to ensure the impartial adjudication of criminal proceedings.

likelihood of material prejudice" adhered to the principles of the First Amendment, *Id.* at 1074-75.

The Michigan Supreme Court upheld the attorney speech-restricting courtesy provisions in *Griev. Adm'r v. Fieger* based on the generalized judicial integrity interest, as opposed to the individualized "fair administration of justice" interest. 476 Mich. 231 (2006). The majority determined that Michigan's legitimate interest in preserving the integrity of the legal system and in the "good moral character of the lawyers it has licensed" justified limiting discourteous and undignified attorney speech toward tribunals and others involved in the legal process during the pendency of a case. *Id.* at 261-62. Relying on *In re Sawyer* and *Gentile*, the Michigan Supreme Court determined that the application of the courtesy provisions transcends not only the courtroom, the judges' chambers, the pleadings filed with the court, the offices used for depositions, and areas that hold a specific nexus between the conduct and a judicial proceeding, but all the way to extrajudicial statements made on the proverbial street corner, at the meeting-hall, on the radio, in the newspaper and even a one's household as long as a case is still pending, the comments concern the tribunal, and the comments are designed to reach the public and the court. *Id.* at 258-59.

In analyzing Plaintiffs' overbreadth and vagueness challenges, this Court acknowledges an attorney's unique position as both an officer of the court and an agent who owes certain duties to her client.

This Court recognizes Michigan's legitimate interests in prescribing attorney conduct and speech to preserve the administration of justice and for the sake of judicial integrity. However, these interests are balanced against Plaintiffs' First Amendment right to criticize State action, especially in light of their position and specialized knowledge.

### C. Overbreadth

The overbreadth doctrine provides an exception to the traditional rules of standing by allowing parties not yet affected by a statute or rule to bring actions under the First Amendment based on a belief that the regulation is so broad as to "chill" the exercise of free speech and expression. *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995). An overbreadth analysis focuses on the potential reach of a regulation requiring an inquiry into a rule's effect on constitutionally protected activity.

> In facial challenges to the overbreadth . . . , a court's . . . task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.

*Houston v. Hill*, 482 U.S. 451, 458-59 (U.S. 1987) (quotation omitted). Judged in relation to the rule's plainly legitimate sweep, a substantial amount of protected speech "suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove

the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks,* 539 U.S. 113, 118-119 (2003).

A substantially overbroad restriction of protected speech will be declared facially invalid unless it is "fairly subject to a limiting construction." *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 577 (1987). In addressing an overbreadth claim, when a state court has interpreted a provision of state law, federal courts cannot ignore that interpretation, even if it is not the one that the court would have reached if it were construing the statute in the first instance. *Kolender v. Lawson,* 461 U.S. 352, 355 (1983).

MRPC 3.5(c) prohibits the "undignified or discourteous conduct toward the tribunal." Defendants point to the rules' commentary, the limitations read into these terms by *Griev. Adm'r v. Fieger, supra,* and the terms' "common understanding" as limits to the provisions. The comment to the rule appears to promote the more specific interest of protecting the parties' rights to a fair trial. The commentary states in part:

> The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An

> advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patent firmness no less effectively than by belligerence or theatrics.

The fact that the other subdivisions of MRPC 3.5 pertain to the improper influencing and *ex parte* communications between attorneys and those involved with pending cases further demonstrates that the Rule appears to be designed to protect the fair administration of justice interest. *See* MRPC 3.5.

In interpreting the rule, the Michigan Supreme Court's opinion selected an expansive construction for the phrase "toward the tribunal." After consulting the dictionary, the majority defined "toward" as "in the direction of" and "with respect to." 476 Mich. at 251. This construction led the Court to include speech occurring both inside and outside the courtroom when made "in a forum designed to reach both the public and the [tribunal]." *Id.*

Additionally, the limit of pending litigation as outlined by the United States Supreme Court in *Gentile* was also interpreted to include its outermost limit. Under the Michigan Supreme Court's interpretation, a case is still pending and as a result the restrictions still apply throughout the time a party has to file for application to leave to the Michigan Supreme Court. *Id.* at 249. This applies even if the parties publicly decide against an appeal.

Finally, as Defendants admit, "[t]he Court did not define the words 'discourteous' or 'undignified' as Plaintiff Fieger's remarks in that case were indisputably 'discourteous' and 'undignified.'" Defendants Taylor, *et al.* Br. at 23. The Michigan Supreme Court appeared to hold that vulgarities, epithets, and personal abuse would fall within the rule's proscriptions but did not limit the rules to only this type of speech. *Griev. Adm'r,* 476 Mich. at 251, 256-57. Defendants rely on this interpretation claiming that the terms "discourteous" and "undignified" are terms of common understanding.

The Michigan Supreme Court interpreted MRPC 6.5(a) as applying to all persons involved in the legal process and requiring attorneys to treat such persons with "courtesy" and "respect." The commentary promotes the general interest of protecting the integrity of the judicial process.

> A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when obligation is met.

According to the Michigan Supreme Court, the purpose and interests for this rule are the same as they are for MRPC 3.5(c). *Id.* at 252.

Defendants argue that in light of these narrowed constructions, the rules withstand constitutional scrutiny and are not overbroad, especially when read in light of the "complex code of behavior to which attorneys are subject." *In re Snyder,* 472 U.S. at 647. Defendants conclude that since these rules are "a call to discretion and civility, not to silence or censorship, and they do not even purport to prohibit criticism," the rules withstand Plaintiffs' First Amendment challenges. *Griev. Adm'r,* 476 Mich. at 246.

In a challenge to facial overbreadth, this Court must determine whether within the rules' plainly legitimate sweep of unprotected speech, a substantial amount of protected speech is also regulated. To begin, attorneys may be sanctioned for impugning the integrity of a judge or the court if their statements are false, but truth may be a defense.

> [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by [*New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)] may be the subject of either civil or criminal sanctions. . . . Truth may not be subject of either civil or criminal sanctions where discussion of public affairs is concerned.

*Garrison v. La.,* 379 U.S. 64, 74 (1964) In the area of attorney commercial speech, the truth defense was

specifically contemplated. *See Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) (the flow of "truthful advertisement concerning the availability and terms of routine legal services . . . may not be restrained.")

However, truth is not an absolute defense in every situation involving attorney speech. For example, truthful attorney speech may be regulated if the speech creates a "clear and present danger" to the fair administration of justice. *See Bridges,* 314 U.S at 261-263. In addition, a pretrial gag order prohibiting the publishing or dissemination of truthful information did not offend the First Amendment in *Seattle Times Co. v. Rhinehart.* 467 U.S. 20 (1984). The Supreme Court in *Gentile* lowered the "clear and present danger" standard to allow restriction of truthful attorney speech that creates a "substantial likelihood of material prejudice" to the fair administration of justice in a pending case. 501 U.S. at 1074-75. Neither the rules, the commentary, nor the Michigan Supreme Court's interpretation limits the rules to such standards.

As discussed above, the scope of speech that may be restricted is greater when done in the interest of promoting the fair administration of justice as opposed to protecting judicial integrity and the public's respect for the institution. Neither the rules, nor their interpretation by the Michigan Supreme Court makes this distinction. By conflating the two interests, the courtesy provisions restrict protected attorney speech that may bring disrespect for the

judiciary even though it would not have an effect on the fair administration of justice.

Although the Michigan Supreme Court's decision attempts to define the contours of the rules, the opinion fails to actually limit the most expansive terms of the provisions, "discourteous" and "undignified." These terms were not defined because the majority believed that Fieger's remarks indisputably violated the rule. *Griev. Adm'r,* 476 Mich. at 256-57. Even though the majority acknowledged that vulgarities, epithets and personal abuse fall within the provisions, the Court did not limit the rules to only this class of language. *Id.* The sweep of the regulation was not limited to merely non-political speech, nor was it limited to purely false speech. Moreover, the opinion fails to address situations involving vulgar, truthful, yet political speech. Does the speech have to reach the level of defamation? Do the rules have to reach "the clear and present danger" to prejudicing the proceeding or merely the "substantial likelihood of material prejudice" standard announced in *Gentile?*

By leaving the terms undefined, the courtesy provisions regulate almost any conceivable arena of attorney expression and critical speech, both protected and unprotected, including speech that should permit "extensive public scrutiny and criticism." *Gentile,* 501 U.S. at 1035 (quotation omitted). As interpreted, the rules reach any criticism of the tribunal whether it is warranted or unwarranted, political or apolitical, truthful or false, vulgar or

artful. There are no exceptions for truth, for political speech, or for speech that does not create a "substantial likelihood of material prejudice" to a pending case.

In addition, the majority failed to differentiate between discourteous and undignified speech that may harm the fair administration of justice and the same type of speech that merely harms the dignity of the judiciary. In promoting the first interest, attorney speech is subject to more limitations based on a less stringent standard, "substantial likelihood of material prejudice." Whereas, when enforcing the rules to preserve judicial integrity, attorney speech should be subject to restriction based on a higher standard.

These rules, as they are now read, are unconstitutionally infirm. This general infirmity results first from a failure to incorporate within each provision any consideration of the interests the rules are trying to protect. Second, they include no standard for guidance, whether it be "substantially likely to materially prejudice" for protecting fair adjudication of pending litigation or the higher standard of "clear and present danger to pending ligation" to preserve the dignity of the judiciary. This Court does not believe that there can be a blanket prohibition on certain areas of comment without any consideration of these interests and their corresponding standards that the rules must meet in order to balance with an attorney's First Amendment rights. Yet these rules do establish such a blanket prohibition, whereby even a trivial, truthful and totally innocuous statement,

although perhaps "discourteous" and "undignified" may be a violation. The First Amendment does not allow this broad sweep. Because the courtesy provisions, as interpreted by the Michigan Supreme Court regulate a substantial amount of protected speech in their plainly legitimate sweep, the provisions are substantially overbroad on their face.

### D. Vagueness

A vagueness inquiry pursuant to the Due Process Clause of the Fourteenth Amendment focuses on the imprecision of the regulation.

> Vagueness may take two forms, both of which result in a denial of due process. A vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable. At the same time an ordinance is void for vagueness if it is an unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement.

*Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1183-1184 (6th Cir. 1995) (citations omitted).

Both failure of adequate notice and arbitrary and capricious enforcement can individually or collectively cause an unconstitutional "chill" to free speech. To determine whether a law is unconstitutionally vague a Court must look to whether the statute is "so imprecise that persons of ordinary intelligence must

guess at its meaning and may differ in their understanding to its application." *Coates v. Cincinnati,* 402 U.S. 611, 614 (1971).

In relation to the terms "discourteous" and "disrespectful," neither the courtesy provisions, nor their commentary, nor the Michigan Supreme Court's opinion in *Griev. Adm'r v. Fieger, supra,* provides the minimal requisite precision that would allow a person of ordinary intelligence to understand their meaning. As discussed above, the rules and the commentary fail to define the terms. Although the rules need not define an offense with "mathematical certainty," the vagueness doctrine requires them to be precise enough so that a person of ordinary intelligence would understand their meaning.

The Michigan Supreme Court's interpretation also includes the inherent contradiction that the rules prohibit "discourteous" and "undignified" conduct but they are not a call "to silence or censorship, and they do not even purport to prohibit criticism." *Griev. Adm'r, supra* at 246. Moreover, this interpretation appears to conflict with Michigan Rule of Professional Conduct 3.6, which allows any extrajudicial statement if a lawyer knows or reasonably should know that it will not have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963). Defendants contend that the Michigan Supreme

Court made clear that vulgar terms, epithets and personal abuse constitute what is prohibited by the rules, comporting with the terms' "common meaning" which would allow a person of ordinary intelligence to understand them.

However, this is belied by the record. Early in 2007, a Michigan State Senator, who happens to be an attorney, made certain comments about a federal judge stating that he was "out of control,' "not quite lucid," and that "something ought to be done about it" based on the judge's series of orders criticizing the health care of Michigan prisoners. "Lawmaker Rips Federal Judge Over Prisoner Health Rulings," David Eggert, Mlive.com, Associated Press 3/27/2007. During oral argument, the assistant Attorney General for the State of Michigan was asked as a member of the Michigan attorney community who is governed by these rules whether she believed that these comments violated the courtesy provisions. Her initial response was, "I don't know . . . I need a more specific context to address that . . . ". This example is precisely the point, that neither she, nor Plaintiffs, nor this Court knows the contours of these terms so that notice is properly given.

To highlight the fact that the courtesy provisions are both overbroad and vague, where is the line for attorney's criticism of the judiciary outside the judicial setting about a pending case? An attorney commenting, "the Court's opinion was wrongfully decided," might instead say:

- Today's ruling by the Court was a travesty of justice that has eroded the liberty of every citizen in the state of Michigan.
- After reading today's opinion, I believe that the Supreme Court is in the back pocket of special interest groups.
- O' wisest of wise panel of the Appellate Court, you are a modern day the Oracle of Delphi. Like the Oracle, you too must have been inhaling the intoxicating vapors when writing this decision.
- The majority's total disregard for United States Supreme Court precedent makes me wonder if the members of the court actually went to law school.
- Three monkeys with typewriters could have a written a more coherent opinion than the one issued today by the Supreme Court.
- Something should be done to those Judges.

As the list illustrates, the standards under these rules are shapeless. One person's courtesy may be another person's abomination. For example, a man extending his hand in greeting may be a courtesy to many. To others, it may be a violation of a fundamental belief. Thus, the chance of selective enforcement based on the judiciary's sensibilities is too great for these rules to withstand constitutional scrutiny.

The Michigan Supreme Court's failure to define the terms, the inherent contradiction with its own ruling, the conflict with the State's pretrial publicity

rule, and Plaintiffs' First Amendment rights to speech relating to the judicial process all lead this Court to find that the rules are also unconstitutionally vague. The rules as interpreted will not only lead to arbitrary enforcement, but they are so imprecise that persons of ordinary intelligence must guess at their meaning and may differ in their understanding to their application.

## II. Standing

Defendants claim that Plaintiffs lack standing to bring suit because they have failed to present evidence of an actual injury. It is well established that under the cases and controversy provision of Article III of the United States Constitution, a plaintiff must have standing to bring suit. In order to demonstrate standing, a plaintiff must show that

> (1) he or she has "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.
>
> . . .
>
> In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing. The plaintiff must allege and/or "demonstrate actual

> present harm or a significant possibility of future harm."

*Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) (*citations omitted*).

"[S]ome broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (citation omitted). Therefore the court has altered

> the traditional rules of standing to permit – in the First Amendment area . . . attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (citation omitted).

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

*Id.* Thus,

> [t]he overbreadth doctrine allows plaintiffs to attack the constitutionality of a statute or

> ordinance "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others before the court to refrain from constitutionally protected speech or expression."

*Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 349 (6th Cir. 2007) (quoting *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 392-93 (1988)).

Recently the Sixth Circuit in *Prime Media* helped explain the intricacies of the standing requirement in First Amendment cases. 485 F.3d 343 (6th Cir. 2007). Plaintiffs challenged as both vague and overbroad under the Constitution a city ordinance that limited the size and height of billboards. The district court determined that even though the ordinance was content neutral, the height and size requirements were not narrowly tailored. The Sixth Circuit reversed the decision finding that the requirements were sufficiently tailored for a content-neutral regulation. The case was then remanded to the district court to address previously unaddressed issues including plaintiff's First Amendment facial challenge to the entire ordinance. *Id.* at 347. On remand, the district court dismissed the suit for lack of standing. *Id.* Plaintiff appealed.

In addressing the issue of standing, the Sixth Circuit initially determined that the city's original permit rejection did not satisfy the injury in fact requirement, because the panel's prior decision found the ordinance to be sufficiently tailored to pass

constitutional scrutiny in relation to that injury. *Id.* at 348. The Sixth Circuit then turned to whether the plaintiff had standing under the overbreadth doctrine, detailing the differences between constitutional standing and the prudential standing doctrine. The constitutional standing requirement "states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." *Id.* (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 475 (1982)). Unlike the constitutional standing requirement, prudential standing is a judicially created doctrine that precludes litigation in federal court

> when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens," or where instead of litigating "his own legal rights and interests," the plaintiff instead purports to "rest his claim to relief on the legal rights or interests of third parties."

*Prime Media, Inc.,* 485 F.3d at 349 (quoting *Warth v. Seldin,* 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

Based on these doctrines, the panel ruled that First Amendment overbreadth claims allow for an exception to the prudential standing doctrine but not an exception to Article III's injury in fact standing inquiry. *Id.*

Defendants argue that Plaintiffs have failed to establish an injury in fact sufficient to meet the constitutional standing requirement, similar to the plaintiff in *Prime Media.* Specifically, Defendants point to *Grendell v. Ohio Supreme Court,* where a plaintiff attorney brought an action for declaratory and injunctive relief against the Ohio Supreme Court to forestall the imposition of sanctions against him for filing a frivolous lawsuit, claiming the rule was unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution. 252 F.3d 828, 830 (6th Cir. 2001). Addressing the standing requirement in relation to past attorney sanctions, the Sixth Circuit in *Grendell* stated:

> Previous sanctions might be "evidence bearing on whether there is a real and immediate threat of repeated injury." However, where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief.

*Id.* at 833 (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983). The Sixth Circuit concluded that the attorney lacked Article III standing to sue because he had not alleged a sufficient injury in fact, either based on his past exposure to sanctions by the Ohio Supreme Court or his assertion that the Ohio rule of practice "chilled" his exercise of protected conduct. *Id.* at 832-83[illegible].

Defendants' reliance upon *Grendell* is inappropriate because of the nature of sanctions and the attenuation of the threat of sanctions. In *Grendell,*

plaintiff brought a frivolous mandamus action that was soon dismissed by the Ohio Supreme Court. The respondents moved for sanctions based on their Ohio court rules and plaintiff failed to respond. As a result, the Ohio Supreme Court determined that sanctions were appropriate. Grendell responded by bringing suit in federal court to forestall the imposition of sanctions. He argued that the rule authorizing the sanctions was unconstitutional because they were imposed without notice and an opportunity to be heard. In defining what was required by the standing doctrine, the Sixth Circuit stated that Grendell was required

> to show a palpable threat of future injury necessary to achieve standing for declaratory and injunctive relief, Grendell must present evidence establishing: (1) that he is bringing or highly likely to bring a lawsuit before the Ohio Supreme Court; (2) that such lawsuit is allegedly frivolous, exposing him to sanctions under Rule XIV, § 5; (3) that the Ohio Supreme Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate due process. Such a chain of events is simply too attenuated to establish injury in fact, and to confer the required standing in this case.

*Id.* at 833.

The likelihood that Plaintiff Fieger may again say something negative about a Michigan court that could subject him to further punishment under the

courtesy provisions is not the attenuated situation presented in *Grendell.* Plaintiff Fieger is a vocal, often harsh, and at times vulgar critic of Michigan's judiciary. To prove that he has suffered an injury in fact, Plaintiff Fieger relies in part on the fact that he already has been subjected to disciplinary proceedings under the courtesy rules which have caused damage to his professional reputation and the considerable expense incurred to defend himself. As discussed, allegations of past injury alone are often not enough to confer standing upon a plaintiff, however "previous sanctions might be evidence bearing on whether there is a real and immediate threat of repeated injury." *Grendell,* 252 F.3d at 833 (quotation omitted). Plaintiff Fieger has a reasonable belief that there is a significant possibility of future harm to him based on these rules. *Peoples Rights Org., Inc. v. City of Columbus,* 152 F.3d 522, 527 (6th Cir. 1998). Since the rules are both overly broad and vague, it would be difficult for either Plaintiff to conform their conduct to the rules.

Moreover unlike *Grendell,* Plaintiffs' challenge involves rules limiting the First Amendment activity of criticizing a public body, the enforcement of which may cause a chill to this Constitutional freedom. In *Grendell,* the Sixth Circuit was less than fully convinced that attorney sanctions for frivolous or harassing lawsuits implicated any First Amendment concerns, but assumed such for the sake of argument. 252 F.3d at 834. After making that assumption the Court found that Grendell could not "establish that

his fear of unconstitutionally imposed sanctions" caused chilling "sufficient to confer standing." *Id.*

As the Supreme Court has stated in terms of the chilling effect, fears of prosecution cannot be merely "imaginary or speculative." *Younger v. Harris,* 401 U.S. 37, 42 (1971). In this case, there is an important First Amendment concern at issue, public discourse and criticism relating to a branch of government. Plaintiffs' political outspokenness is in stark contrast to Grendell's First Amendment concern of a right to file frivolous lawsuits. Plaintiffs' fear of prosecution is not merely imaginary or speculative, since at oral argument Defendants admitted that this was not the first time that Plaintiff Fieger has been threatened under these rules. Transcript of August 8, 2007 Hearing at 20 (the first instance involved a former Oakland County prosecutor where a complaint was filed but formal charges never brought). As a result, this Court finds that Plaintiffs have standing to bring suit.

It should also be noted that if this Court were to adopt Defendants' standing argument, Plaintiffs would be stuck in a procedural rabbit hole that would result in Plaintiffs being forever precluded from possessing the requisite standing required for federal review. When Plaintiffs first raised the facial challenge to the courtesy provisions at a time when a state grievance was pending, Defendants argued that abstention was required. This Court agreed. Now that the proceeding is not pending, Defendants claim that Plaintiffs lack standing to prospectively challenge the

provisions because there is no pending grievance or proceeding. At oral argument, Defendants were asked repeatedly if there would ever be a situation where a plaintiff would possess the requisite standing to facially challenge the courtesy provisions in a federal court. Defendants pointed to the situation where an attorney had been disciplined but the discipline had then been set aside as inappropriate either by the Board, the Grievance panel, or the Michigan Supreme Court. Defendants' response is too limited and would likely cause issues concerning the existence of an actual case or controversy to arise.

This "standing-abstention" combination was rejected by the Supreme Court in *Steffel v. Thompson.* 415 U.S. 452 (1974). The plaintiff in *Steffel* was threatened several times with prosecution under a criminal trespass statute for distributing handbills in a shopping center. On a day when plaintiff was again distributing handbills, the police arrived and threatened to arrest him. Plaintiff left and later filed suit. The district court dismissed the case for lack of standing. The Supreme Court reversed in a unanimous opinion, because Plaintiff had a well-founded threat of future prosecution sufficient to invoke the jurisdiction of the federal court under the Declaratory Judgment Act. *Id.* at 459. "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Id.*

> [A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

*Id.* at 462.

In a January 7, 2007 majority opinion, Justice Scalia reiterated that standing can exist prior to a plaintiff's liability:

> Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminated the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

*MedImmune v. Genentech,* 127 S. Ct. 764, 772 (2007) (emphasis in original).

In analyzing the issue, the injury in fact requirement is satisfied when the threat of harm coerces the plaintiff into not doing something that the plaintiff claims she had the right to do. "The dilemma posed by that coercion – putting the challenger to the choice between abandoning his rights or risking

prosecution – is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. *Id.* at 773 (quotation omitted).

Here Defendants prior enforcement of the courtesy provisions and the Michigan Supreme Court's interpretation of those provisions is just such a real and imminent government threat. This threat of discipline to attorneys for exercising their First Amendment right to criticize the judiciary, especially where the judiciary is elected, effectively coerces Plaintiffs to possibly forgo their exercise of fundamental right to free speech relating to politics. As a result, this Court agrees that Plaintiffs have standing to facially challenge the courtesy provisions.

**III. Ripeness**

Article III of the Constitution of the United States requires that parties seeking to invoke the power of federal courts must allege an actual case or controversy. *O'Shea v. Littleton,* 414 U.S. 488, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974). The rationale behind the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agricultural Products, Co.,* 473 U.S. 568, 580 (1985). Determining ripeness in the context of the Declaratory Judgment Act, where the relief sought is prior to enforcement, is similar to the standing doctrine inquiry discussed above.

> [T]he ripeness doctrine not only depends on the finding of a case and controversy and hence jurisdiction under Article III, but it also requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances.

*Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 567 (6th Cir. 1995). A case is considered ripe in this context "if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of declaratory judgment." *Nat'l Rifle Assoc. of America v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (quotation omitted). The test for determining whether a case is ripe requires the Court to balance several factors including the likelihood that harm as alleged by Plaintiff will ever come to pass, whether the factual record is sufficiently developed to produce a fair adjudication of the merits, and an assessment of the hardships to parties if judicial relief is denied. *Adult Video Ass'n*, 71 F.3d at 567.

If the courtesy provisions are either vague or overly board, then the harm to Plaintiffs is a continuing harm, in that Plaintiffs' First Amendment free speech rights are being chilled. As discussed previously, Plaintiffs fear of further prosecution is reasonable based on their past experiences and the Michigan Supreme Court's interpretation of the rules.

In terms of the second factor, the factual record is sufficiently developed to produce a fair adjudication

on the merits. The case involves the purely legal question of the constitutionality of the courtesy provisions as interpreted by the Michigan Supreme Court in *Griev. Adm'r v. Fieger, supra.*

Finally in terms of the hardships to the parties, if the courtesy provisions are unconstitutional Plaintiffs will suffer greater hardships through chilling effect on their free speech than the Defendants' hardship of not being able to enforce the provisions, as other remedies would still be available to the Court to punish certain types of speech and behavior in regulating Michigan attorneys.

Based on Plaintiffs' real fear, the likelihood that Plaintiffs will speak critically of the Michigan judicial branch, the completeness of the factual record for deciding this question of law, and the fact that Plaintiffs' hardships outweigh those of the Defendants, this Court finds that Plaintiffs' claims are ripe for judicial review.

However, in relation to Defendants Kelly, Cavanagh and Weaver, there is no justiciable claim against them because there is no actual case or controversy between them and Plaintiffs. Justices Kelly, Cavanagh and Weaver dissented in *Griev. Adm'r v. Fieger* and instead determined that the courtesy provisions are unconstitutional. Thus, Plaintiffs cannot acquire declaratory relief where these particular Defendants have already provided such relief. Therefore, Defendants Kelly, Cavanagh and Weaver are DISMISSED from the case.

## IV. Claim and Issue Preclusion

The next procedural hurdle is whether the doctrines of claim and issue preclusion apply. The Full Faith and Credit Clause and Act, 28 U.S.C. § 1783 requires federal courts to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 80-82 (1984) (citation omitted).

### A. Claim Preclusion

In terms of concurrent jurisdiction, the entry of judgment by the state court before a federal court triggers preclusion law.

> *Res judicata* may bar any claims over which the federal courts have jurisdiction, including both claims of injuries caused by state-court judgment and general challenges to state statutes. Federal courts must give the same preclusive effect to a state-court judgment as that judgment received in the rendering state. 28 U.S.C. § 1738. Michigan recognizes two preclusion doctrines: *res judicata*, or claim preclusion; and collateral estoppel, or issue preclusion.
>
> . . . .
>
> Claim preclusion bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have

> been resolved in the first. . . . Claim preclusion bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence could have raised but did not.

*Abbott v. Michigan,* 474 F.3d 324, 330-31 (6th Cir. 2007) (citations omitted).

Claim preclusion is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, encourage reliance on adjudication, and promote comity between the state and federal courts." *Dubuc v. Green Oak Twp.,* 312 F.3d 736, 744 (6th Cir. 2003) (citation omitted).

The July 31, 2006, Michigan Supreme Court decision in *Griev. Adm'r v. Fieger, supra,* satisfies the first prong of the claim preclusion test in relation to certain issues such as the as applied challenge and the definition of certain terms used in the statute.

"To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v. State Dept. of Ed.,* 470 Mich. 105, 122 (2004). "[T]he outer limit of the doctrine traditionally requires both a 'substantial identity of interest' and 'a working functional relationship' in which the interests of the nonparty are presented and protected by the party in litigation.'" *Id.* at 122 (internal citation omitted). Plaintiff Fieger and

Defendants in the original case, as an arm of the Michigan Supreme Court, are essentially the same parties with the same interests as they are in this case. Based on Michigan's privity law, Plaintiff Steinberg is also likely in privity with Plaintiff Fieger because he seeks the same remedy, makes the same arguments, and alleges the same inquiry and therefore is "so identified" with the same interests as Plaintiff Fieger that he is in 'privity.' Thus, the second prong is also satisfied.

In terms of the third prong, the Court must look to the previous decision to determine what was and what could have been decided. In *Griev. Adm'r v. Fieger, supra,* the Michigan Supreme Court failed to address both facial challenges to the rules vagueness and overbreadth. The majority determined the question of vagueness need not be answered because "there is no question that the most casual reading of these rules would put a person on notice that the kind of language used by Mr. Fieger would violate" the rules. 476 Mich. at 254. The majority went on to find that the language was neither campaign nor political speech. It concluded by stating, "Mr. Fieger's comments are not protected under his various theories of vagueness, of political speech or of public figure comment." *Id.* at 262. Despite this, Defendants contend that the challenges raised here were or could have been raised in the context of the discipline enforcement.

However, the majority opinion refused to reach or consider an argument based on the facial validity of

the courtesy rules because of the supposed obviousness that the remarks at hand violated the courtesy provisions. *Id.* at 254. The essence of an overbreadth argument is that the rule reaches both protected and unprotected speech. Thus, since the Michigan Supreme Court only decided that Plaintiff Fieger's specific comments violated the provisions, there is still the federal constitutional question as to whether the continued enforcement of such rule is overly broad in violation of the First and Fourteenth Amendments. The issues were not decided by the Michigan Supreme Court.

Additionally, the issue before this Court could not have been decided in the previous litigation since it was only after the Michigan Supreme Court's decision in *Griev. Adm'r v. Fieger* that attorneys were given notice as to certain contours of the courtesy provisions. Plaintiffs who now seek wholly prospective relief to preclude future prosecution under unconstitutional rules as limited by the recent decision are not estopped based on the doctrine *res judicata*.

### B. Issue Preclusion

The purpose of collateral estoppel is to shield litigants and the judicial system from the burden of relitigating identical issues to avoid inconsistent results.

> Where the issues of fact or law have been finally determined by a court of competent jurisdiction in one legal action which are

> essential to the maintenance of another legal action, it is universally held that the second action must fail.

*Jones v. Chambers,* 353 Mich. 674, 680 (1958).

> In Michigan, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue;' and (3) there must be mutuality of estoppel.

*Gilbert v. Ferry,* 413 F.3d 578, 580-581 (6th Cir. 2005) (quotations omitted).

Defendants argue that the first prong is satisfied because issues now raised were actually litigated and determined by the Michigan Supreme Court. Defendants point to decisions made by the Michigan Supreme Court that are material to this federal claim which include:

- The parameters of MRPC 3.5(c) and MRPC 6.5(a) prohibit "undignified," "discourteous" and "disrespectful" conduct or remarks. These rules do not purport to prohibit criticism but instead are a call to discretion and civility.
- The courtesy rules apply when a case is ongoing, and greater restraint is permissible when a case is ongoing than when it is completed.
- In the Court of Appeals, a case is still pending until after the expiration of the time for filing an

application for leave to appeal to the Supreme Court and, if filed, until after the disposition of the case by that Court.

- The courtesy rules apply to comments made outside the courtroom as well as those inside the courtroom.

*See Griev. Adm'r v. Fieger, supra*

The Michigan Supreme Court concluded that the rules put attorneys on notice of the kind of language used by Fieger would violate courtesy provisions but yet they still are "undoubtedly flexible" and invite the exercise of some discretion in determining whether to charge an attorney with a violation. *Id.* at 254-55. Based on the interpretation of the courtesy provisions, the majority held that the courtesy rules do not preclude expressing disagreement with the judge or judges on a case but instead preclude expressing disagreement and criticism in terms that could bring disrepute on the legal system. *Id.* at 261. Further, the Michigan Supreme Court held that the rules vindicate the Michigan Supreme Court's interest in good moral character of the lawyers it has licensed to serve as officers of the court. *Id.* at 262

Based on these rulings, Defendants make the leap that Plaintiffs should be collaterally estopped from raising either a facial overbreadth or vagueness challenge. This Court agrees that the Michigan Supreme Court's limiting interpretation of the rules must be incorporated in a facial review of the provisions. However, this Court disagrees that based

on these interpretational rulings Plaintiffs should be forever precluded from federal review of the facial constitutionality of these provisions.

In *Wooley v. Maynard,* Maynard filed a declaratory action in federal court after the state court found that he violated state law after covering with tape part of New Hampshire's motto on his license plate. 430 U.S. 705, 706-709 (1977). A three-judge panel of the district court enjoined the state from arresting or prosecuting the Maynards at any time in the future for the conduct. *Id.* at 709. The Supreme Court rejected the attorney general's argument that Maynard failed to seek review of his conviction in the state court. The Court noted that Maynard was not seeking to set aside or annul his state court convictions but rather he sought to preclude future prosecution under an arguably unconstitutional law. *Id.* at 711.

> [T]he suit is in no way designed to annul the results of a state trial since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights . . . The Maynards seek only to be free from prosecutions for future violations of the same statutes.

*Id.*

Similar to the plaintiff in Maynard, Plaintiffs here seek to avoid future prosecution under unconstitutional rules as limited by the Michigan Supreme

Court. The facial constitutionality of these statutes is reviewable as limited by the Michigan Supreme Court's findings in its decision in *Griev. Adm'r v. Fieger, supra.* Under Defendants' construction, Plaintiffs would be forever ensnared in an unescapable trap, despite the fact that the Michigan Supreme Court refused to answer certain issues. In its review of the rules, the Michigan Supreme Court was not merely answering questions of fact but also answering issues of law that may have been wrongfully decided.

Plaintiffs seek to challenge the constitutionality of the rules on its face as interpreted by the prior decision. Under Defendants' construction of collateral estoppel, Plaintiffs are now forever barred from such review, leaving the Michigan Supreme Court as the final arbiter of federal questions arising under the United States Constitution. This is inconsistent with the Supremacy Clause of the Constitution. U.S. Const., Art. IV, cl. 2.

## V. Immunity

### A. Legislative Immunity

Defendants claim that they are immune from suit based on legislative immunity. In *Supreme Court of Virginia v. Consumers Union for the United States, Inc.*, the United States Supreme Court determined whether the Virginia Supreme Court and its chief justice were officially immune from a 42 U.S.C. § 1983 action that constitutionally challenged the

Virginia Court's disciplinary rules governing the conduct of attorneys. 446 U.S. 719 (1980). The Court held that in promulgating the Virginia Code of Professional Responsibility, the Virginia Supreme Court acted in its legislative capacity thereby making the court and its members immune from suit. *Id.* at 731-734. Nevertheless, the Virginia Supreme Court and its chief justice were held liable for their enforcement capacities since Virginia law gave the court independent authority on its own to initiate proceedings against attorneys. *Id.*

Relying in part upon *Consumers Union,* the Sixth Circuit in *Abick v. Michigan* upheld the district court's grant of Eleventh Amendment legislative immunity to the Defendant Michigan Supreme Court and the individual justices. 803 F.2d 874, 878 (6th Cir. 1986). The Michigan Supreme Court enacted a new service of process that conflicted with thirty-sixth district court's bailiffs' statutory right to be the exclusive servers for the district. *Id.* at 875. The bailiffs claimed that their property interest in their position was taken without due process or just compensation. *Id.* The individually named justices were found to be shielded from the suit by legislative immunity because the act of promulgating court rules relating to practice by the Michigan Supreme Court was considered a "legislative activity." *Id.* at 877-878.

While it is true that the Michigan Supreme Court's mere enactment of rules governing professional conduct is protected by legislative immunity in accordance with *Abick,* the Court and the Justices in

their official capacities are liable in their enforcement capacities similar to those of *Consumer Union.* The Michigan Supreme Court has the inherent authority both to regulate (legislative capacity) and to discipline members (enforcement capacity) of the state bar and for more than 150 years has done so. This power is rooted in Art. 6 § 5 of the Michigan Constitution of 1963: the Michigan Supreme Court has "the power to regulate and discipline the Bar of this state." *In re Schlossberg v. State Bar Griev. Bd.,* 388 Mich. 389 (1972). In *Griev. Adm'r v. August,* the Supreme Court stated, "[t]he power to regulate *and discipline* members of the bar rests ultimately with this Court pursuant to constitutional mandate." 438 Mich. 296, 304 (1991) (*emphasis added*). Thus, the Michigan Supreme Court has the final say and not the Grievance Board or the Commission, who are merely entrusted with some ability to enforce the rules. Unlike *Abick* and similar to *Consumers Union,* the Michigan Supreme Court both has the legislative power and the enforcement power to regulate and discipline attorneys. Therefore, the individual justices are not entitled to legislative immunity based on their enforcement capacities.

### B. Eleventh Amendment Argument

Defendants also claim because the Michigan Supreme Court is an agency of the state and that the individual justices as well have been sued in their official capacities that they are immune under the

Eleventh Amendment and that this does not fit within the *Ex Parte Young* exception.

> The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent. To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. This standard allows courts to order prospective relief, as well as measures ancillary to appropriate prospective relief. Federal courts may not award retrospective relief, for instance money damages or its equivalent, if the State invokes its immunity.

*Frew v. Hawkins,* 540 U.S. 431, 437 (U.S. 2004) (*citations omitted*).

Because the Plaintiff asks for preliminary and injunctive relief, Defendants argue that such relief would be retrospective. This Court disagrees and finds that Plaintiffs seek prospective relief of the type contemplated by the *Ex Parte Young* exception. 209 U.S. 123 (1908).

## VI. Conclusion

For these reasons, this Court finds that Michigan Rules of Professional Conduct 3.5(c) and 6.5(a) as interpreted by the Michigan Supreme Court opinion *Griev. Adm'r v. Fieger,* 476 Mich. 231 (2006), violate the First Amendment and the Due Process Clause of

the Fourteenth Amendment because the provisions are both overbroad and vague. Therefore, declarative relief is granted. Michigan Rules of Professional Conduct 3.5(c) and 6.5(a), referred to as the courtesy and civility provisions, shall not be enforced.

**IT IS SO ORDERED.**

S/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: September 4, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 4, 2007, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Secretary

No. 07-2213

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| GEOFFREY NELS FIEGER, ET AL., | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | |
| MICHIGAN SUPREME COURT, ET AL., | ) | ORDER |
| Defendants-Appellants, | ) | (Filed May 1, 2009) |
| MICHAEL F. CAVANAUGH, ET AL., | ) | |
| Defendants. | ) | |

**BEFORE:** BOGGS, Chief Judge; MERRITT and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green
Clerk